# Petition

81-1070

U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No.______________

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MICHAEL R. WOOD, individually and dba

NATIONAL PHOTO SERVICES,

Petitioner,

-vs-

WILLARD W. McEWEN, JR., et al.,

Respondents.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MICHAEL R. WOOD
1266 Coast Village Road
Santa Barbara, CA 93108
(805) 969-5935

Petitioner Pro Se

## QUESTIONS PRESENTED

1. Must a special master disqualify himself where he is an active officer and director of a corporation which continuously employs two of the parties to the action as its exclusive advertising agents and the litigation before him arises out of an advertising campaign those parties undertook for his corporation?

2. Does a party have a remedy under Rule 60(b)(6) of the Federal Rules of Civil Procedure and/or by an independent action in equity to set aside a judgment based in large measure on the affidavit and report of a special master who should have disqualified himself?

## LIST OF PARTIES

Plaintiff:

MICHAEL R. WOOD, individually and dba NATIONAL PHOTO SERVICES

Defendants:

WILLARD W. McEWEN, JR.
HUGH J. HAFERKAMP
MONTE L. WIDDERS
CHACE COMPANY ADVERTISING, INC., a corporation
THOMAS CHACE, an individual
BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., aka BETTER BUSINESS BUREAU OF THE TRI-COUNTIES INC., a corporation
SANTA BARBARA CHAMBER OF COMMERCE, INC., a corporation
ALL YEAR ASSOCIATION, a subsidiary corporation of the Santa Barbara Chamber of Commerce

## LIST OF PARTIES - CONTINUED

AETNA LIFE & CASUALTY, INC., a corporation;

HARTFORD LIFE INSURANCE COMPANY, a corporation, aka HARTFORD INSURANCE GROUP

CAVALLETTO, WEBSTER, MULLEN & McCAUGHEY, a partnership

HOLLISTER, BRACE & ANGLE, a partnership

HOLLISTER & BRACE, INC., a corporation formerly Hollister, Brace & Angle, a partnership

GEORGE A. REMPE, III

J. JAMES HOLLISTER, III

JAMES W. BROWN

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No. ______________

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MICHAEL R. WOOD, individually and dba
NATIONAL PHOTO SERVICES,

Petitioner,

vs.

WILLARD W. McEWEN, JR., et al.,

Respondents.

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Petitioner Michael R. Wood, individually and dba National Photo Services, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 4, 1981.

## OPINIONS BELOW

The opinion and judgment of the Court of Appeals, reported at 644 F.2d 797; the order denying a petition for rehearing and rejecting a suggestion for rehearing en banc; and the district court's memorandum of decision and its judgment of dismissal, all appear in the Appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 4, 1981. A timely petition for rehearing en banc was denied on August 10, 1981. On November 4, 1981 this Court granted an extension of time to December 7, 1981 for the filing of this petition. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

## STATUTE AND RULE INVOLVED

28 U.S.C. Sec. 455 provided, during the relevant time period (March 1974 through May 1974), as follows:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:...(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;...or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken....This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, ...or to set aside a judgment for fraud upon the court . . ."

## STATEMENT OF THE CASE

This petition arises from the dismissal, for failure to state a claim on which relief could be granted, of an action to set aside a judgment in a prior action.

### A. The Prior Action.

In May 1972, petitioner (hereinafter "plaintiff") filed an action in the United States District Court for the Central District of California against Chace Company Advertising, Inc., Thomas Chace, and Better Business Bureau of Santa Barbara, Inc. (The complaint is attached as Exhibit A to the complaint in the present action.) The first cause of action was for copyright infringement and unfair competition 1/ against the two Chace defendants only (hereinafter

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1/ The district court's jurisdiction was based on 28 U.S.C. Sec. 1338.

"Chace"), and alleged in substance that plaintiff submitted 400 proofs of photographs to Chace for potential use in a certain advertising campaign for the Santa Barbara Chamber of Commerce, Inc.; that Chace selected and used 18 of the photographs in the original ad campaign and subsequently used other of plaintiff's 400 copyrighted photographs in a later campaign, without permission. The second cause of action was for antitrust violations and group boycott, 2/ and alleged in substance that Chace wrote and all defendants published a letter (attached to the complaint as an exhibit) to the Santa Barbara business community and to clients and vendors throughout the United States encouraging a boycott of plaintiff's photography business, stating:

> "Mike Woods and/or other

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2/ The district court's jurisdiction was based on 28 U.S.C. Sec. 1337.

> peronnel of National Photo Services are forbidden entrance to our offices and shall be afforded no futher work of any kind either from us or fromoutside photographers with whom we work."
>
> ". . . [W]e will reject any part of any job that has in any way been serviced by any individual in National Photo Services including but not limited to photo processing and other lab work."

The complaint further contained two pendant causes of action.

During discovery, each side claimed the other was not cooperating fully, and the court expressed its impatience with both plaintiff _and_ _defendants_ [Reptr's Tr. of 4/1/74 (attached as Exhibit C to the complaint in present action) p. 50:3-17]. The court stated, _inter_ _alia_ [_id_. at 51:14-19]:

> "Each side had better take a pretty close look at his or its respective position and be satisfied that either a proper demand has been made or a proper response has been given. Any unreasonable failure to have acted reasonably and properly there will be considered a ground for the imposition of sanctions."

In a notice filed March 27, 1974, Chace requested that the court appoint a special master to supervise discovery, and suggested that the court appoint Willard W. McEwen, Jr., a United States Magistrate [Exhibit B to complaint in present action]. At a hearing on April 1, 1974, the court appointed Mr. McEwen as a special master to supervise all discovery in the case, with his fees and expenses ultimately to be taxed as costs but initially advanced one-third by each of the three parties [Reptr's Tr. of 4/1/74 (attached as Exhibit C to complaint in present action), p. 49:11-16, p. 50:18-24, p. 51:5-6]. Plaintiff, being advised only that Mr. McEwen was a federal magistrate in Santa Barbara, objected to his appointment and asked that the special master be "somebody out of the Santa Barbara area", but the court reaffirmed its appointment of Mr. McEwen [*id*. p. 51:2 to p. 52:17].

Discovery then continued with certain supervision by Mr. McEwen. On or about April 27, 1974, defendants jointly filed an ex parte application for dismissal of the action for plaintiff's alleged failure to comply with orders by the court and by the special master relating to discovery. In support of the application defendants filed an Affidavit and Interim Report of Special Master, in which Mr. McEwen related certain rulings he had made and plaintiff's purported failure to comply with those rulings. [Exhibit E to the complaint in the present action.] 3/ On April 29, 1974, the court denied ex parte relief but ordered plaintiff to show cause on May 6, 1974 why the action should not be dismissed. On May 2, 1974, defendants filed affidavits in support of the order to show cause, and plaintiff filed an affidavit in opposition to the order to show cause. In his affidavit, plaintiff related facts showing that he did not refuse to permit discovery nor refuse to comply with the orders of the court or special master, and that he was attempting to comply as best he could with his discovery obligations, despite what he considered to be a pattern of unusually

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3/ It should be emphasized that Mr. McEwen did not file his Affidavit and Interim Report with the court; he simply furnished it (if indeed he authored it himself) to defendants' counsel, who attached it to their ex parte application for dismissal.

onerous and arbitrary rulings by the special master.

Nevertheless, following the hearing on May 6, 1974, the court on May 23, 1974 issued a Memorandum of Decision and Order Dismissing Action [Exhibit K to complaint in present action]. Relying in large measure on the affidavit and interim report of the special master [Exhibit K , p. 5:4 to p. 6:5, p. 7:9-12], the court found that plaintiff was wilfully flouting the power of the court to direct and control the discovery process, and ordered that the action be dismissed with prejudice "for the failure of the plaintiff to comply with the Federal Rules of Civil Procedure, the Local Rules of the United States District Court for the Central District of California, the specific orders of this Court regarding discovery, and the orders of the special master appointed to supervise discovery in this case" [Exhibit K, p. 7:15-31]. Judgment dismissing the action was entered June 10, 1974 [Exhibit L to the complaint in the present action]. Plaintiff appealed from the judgment to the Ninth Circuit Court of Appeals, but that Court dismissed plaintiff's appeal and this Court denied plaintiff's petition for a writ of certiorari (Docket No. 75-363). 4/

B. The Present Action.

In May 1977, plaintiff filed this action to set aside the earlier judgment,

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4/ Plaintiff's appeal was dismissed under circumstances which are, frankly, shocking. Plaintiff filed a timely notice of appeal and a timely designation of the contents of the record on appeal. Pursuant to orders extending until October 7, 1974 the time for transmitting the record on appeal to the Court of Appeals, the clerk of the district court on that date transmitted the original record on appeal to the Ninth Circuit. The Court of Appeals duly notified plaintiff that the $50.00 docket fee was then due, and plaintiff paid the fee and obtained a receipt dated January 7, 1975 from the Court of Appeals. On March 20, 1975, and on August 29, 1977, before any responsive pleading was served, plaintiff filed a first amended complaint.[Clerk's Record Item 4] 5/ (Earlier and further references in this petition to the complaint in the present action refer to the first amended complaint.) Jurisdiction was invoked under the statutes which conferred jurisdiction over the prior action, and under Rule 60(b) of the Federal Rules of Civil Procedure, specifically subsections (3) and (6) and the provision therein for an independent action. The complaint named as defendants, in addition to the defendants

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cont. 4/ defendants filed a motion to dismiss the appeal on the sole ground of failure to timely pay the docket fee, supported by an affidavit by Hugh J. Haferkamp, attorney for Chace, sworn to on March 13, 1975, asserting that as of that date plaintiff had not paid the docket fee. On March 26, 1975, plaintiff filed an opposition to the motion for dismissal, demonstrating that the docket fee had indeed been paid and the appeal timely in the prior action, a number of additional parties including Mr. McEwen, defendants' attorneys in the prior action, the Santa Barbara Chamber of Commerce, Inc., and others.

The complaint alleged the facts concerning the prior action and, in substance, the following:

Since 1965, Willard W. McEwen, Jr. had been active in the Santa Barbara Chamber of Commerce; 6/ he had been

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cont. 4/prosecuted in every respect. On March 31, 1975, the Court of Appeals sent a letter to plaintiff confirming that the docket fee had been paid and that plaintiff's opening brief was due May 10, 1975. Inexplicably, the Court of Appeals then entered an order on April 21, 1975, dismissing plaintiff's appeal for lack of prosecution; Plaintiff's petition for rehearing, filed May 12, 1975, was denied as untimely on June 9, 1975; and plaintiff's petition for writ of certriorari was denied by this Court on November 3, 1975.

5/ Rule 15(a) of the Federal Rules of Civil Procedure provides that a party "may amend his pleading once as a matter of course at any time before a responsive pleading is served. . . ." The first amended complaint merely corrected minor instrumental in drafting a bed-tax ordinance which was designed to finance tourist promotions through advertising administered by the Chamber and its subsidiary, the All Year Association; in June 1973 he had been sworn in as a part-time United States Magistrate at Santa Barbara and continued his private law practice there; at the time of his appointment and activity as special master in the prior action he was an officer of the Chamber of Commerce, and two years later, in 1976, became its president; that the two Chace defendants in the prior action were the exclusive advertising agents for the Chamber of Commerce and its

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cont. 5/ errors in the orginal complaint but made no substantive changes in the allegations.

6/ Indeed, certain of the defendants admitted in the Court of Appeals that Mr. McEwen had been a director of the Chamber since 1965 (Substituted Opening Brief of Appellee's Better Business Bureau, et al., p. 24).

All Year Association; that the prior action involved a dispute arising out of one of the Chamber's advertising campaigns; that Mr. Chace acknowledged in discovery during the prior action that the Chamber of Commerce with its subsidiary, the All Year Association, was a client of his and that he probably sent a copy of the boycott letter or memo to it; that Chace's attorneys were also members of the Chamber of Commerce and knew of Mr. McEwen's intimate involvement with the organization and his capacity as an officer thereof; and that the attorney for the other defendant, Better Business Bureau of Santa Barbara, also knew of Mr. McEwen's involvement with the Chamber of Commerce. 7/ The complaint further alleged that plaintiff did not know of Mr. McEwen's involvement in the Chamber of Commerce and neither Mr. McEwen nor defendants' attorneys revealed the facts to plaintiff or to the district court. Plaintiff first discovered Mr. McEwen's relationship with the Chamber of Commerce in March 1977, and plaintiff filed this action within two months thereafter.

The complaint contained additional allegations that Mr. McEwen and defendants and their attorneys intentionally Mr. McEwen's connection with the Chamber of Commerce and that said parties perpetrated a fraud upon plaintiff and upon the court for the purpose of effectively thwarting plaintiff's discovery and destroying his cause of action.

In response to plaintiff's request for admission of facts, served on the defendants in the present action on August

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7/ Indeed, in his opposition to motion to dismiss the action, plaintiff filed documents showing that the latter attorney, Monte L. Widders, succeeded Mr. McEwen in 1973 as chairman of the Chamber's State Legislation Committee [Clerk's Record item 39, Exs. A and B]

30, 1977, the Santa Barbara Chamber of Commerce entered into a stipulation approved by the district judge and filed November 14, 1977, admitting, as to that defendant, the following facts, among others:

> That Mr. McEwen was actively involved in the Santa Barbara Chamber of Commerce from 1965 to 1976; that he was an officer thereof from 1972 through 1976, in which latter year he was its president; that he assisted in advertising programs designed to finance tourist promotions administered by the All Year Association, a Chamber of Commerce non-profit subsidiary; that Chace Company Advertising, Inc. and Thomas Chace acted as agents for the Chamber of Commerce in placing advertising in the media and was the advertising agent for the All Year Association; and that at no time did Mr. McEwen disclose his status and the

> inherent conflict of interest on his part to the district court [Clerk's Record items 7 and 104].

Nevertheless, on December 22, 1977 the court granted a motion to dismiss the action as to most of the defendants [Clerk's Record item 114]; on March 22, 1978 the court granted a dismissal as to the rest of the defendants [Clerk's Record item 121]; on February 23, 1979 the court filed its memorandum of decision on the dismissal [Clerk's Record item 177]; and on February 27, 1979 the judgment of dismissal was entered [Clerk's Record item 173].

### C. The District Court's Opinion.

In its memorandum of decision, the district court held that only the defendants to the prior action are proper defendants in the present case; that the complaint alleges no reason why Mr. McEwen could not properly serve as a special master in the prior case; that any fraud that may have existed was intrinsic, not extrinsic, and was therefore not actionable; and that since the dismissal of the prior action was not based entirely on Mr. McEwen's affidavit and interim report, any error was harmless.

### D. The Court of Appeal's Opinion.

The Court of Appeal's per curiam opinion, in reciting the background of the litigation, states that the court in the prior action "held nine hearings on the difficulties which the defendants were experiencing in obtaining discovery from Wood" and "complained of Wood's recalcitrance", ignoring the reporter's transcript attached to the complaint in this case clearly showing that the district judge was concerned with defendants' recalcitrance as well. 8/ The opinion goes on to recite facts from Mr. McEwen's affidavit and interim report to the effect that plaintiff continued to refuse to participate in discovery and refused to abide by Mr. McEwen's rulings.

The opinion recites the dismissal of the prior action with prejudice but incorrectly states that the Court of Appeals affirmed the judgment, ignoring the (baseless) dismissal of the appeal for lack of prosecution.

The opinion asserts that "Wood does not attempt to justify his refusal to comply with the court's orders nor does he deny that he refused to permit discovery." That statement ignores plaintiff's opposition to the order to show cause in the prior action and the detailed allegations in the complaint in the present action.

The key holding of the opinion, for the purposes of this petition, is the following:

> ". . . Wood's allegations do not provide a basis to vacate the prior judgment. His allegation of McEwen's membership in the Chamber of Commerce, an organization that was not even a party to the action, does not support an allegation of a conflict of interest and does not indicate either extrinsic fraud or fraud on the court."[Emphasis added.]

As will be shown, this holding simply ignores the facts pleaded by plaintiff showing a direct, rather than attenuated, relationship between Mr. McEwen and the Chace

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8/ Indeed, as the record plainly showed, all nine hearings were in fact on plaintiff's motions to compel discovery from defendants.

defendants. Nevertheless, the Court of Appeals termed plaintiff's action and appeal frivolous, affirmed the district court's judgment of dismissal, and imposed sanctions upon plaintiff.

# REASONS FOR GRANTING THE WRIT

## THE SPECIAL MASTER'S FAILURE TO DISCLOSE HIS CLOSE CONNECTION WITH TWO OF THE DEFENDANTS IN THE PRIOR ACTION (AS AN ACTIVE OFFICER AND DIRECTOR OF A CORPORATION WHICH CONTINUOUSLY EMPLOYED THOSE DEFENDANTS AS ITS EXCLUSIVE ADVERTISING AGENTS AND OUT OF WHICH EMPLOYMENT RELATIONSHIP PLAINTIFF'S VERY LAWSUIT AROSE) IS SUCH A SHOCKING BLEMISH ON THE INTEGRITY OF THE FEDERAL JUDICIAL PROCESS THAT, WHETHER OR NOT ACTUAL FRAUD OR BIAS EXISTED, THE PUBLIC INTEREST DEMANDS THAT PLAINTIFF BE RELIEVED FROM THE JUDGMENT IN THAT ACTION, A JUDGMENT BASED IN LARGE MEASURE ON THE SPECIAL MASTER'S AFFIDAVIT AND REPORT.

1. Preliminarily, it must be borne in mind that this case arises from a dismissal of plaintiff's complaint for

failure to state a claim upon which relief can be granted. Accordingly, the allegations of the complaint must be construed most favorably to plaintiff, and the dismissal was erroneous unless it appears beyond a doubt that plaintiff was entitled to no relief. Scheuer v. Rhodes, 416 U.S. 232, 236, 250.

2. The action should not have been dismissed. A special master has the duties and obligations of a judicial officer, In re Gilbert, 276 U.S. 6, 9, and the prevailing rules governing disqualification of judicial officers apply. Lister v. Commissioners Court, Navarro County, 566 F.2d 490, 493 (5th Cir. 1978); 5A Moore's Federal Practice Sec. 53.03, p. 53-19. In April 1974, when Mr. McEwen's appointment as special master occurred, the prevailing rules were found in the following sources:

First, 28 U.S.C. Sec. 455

provided in pertinent part that a federal judge "shall disqualify himself in any case in which he . . . is so . . . connected with any party . . . as to render it improper, in his opinion, for him to sit on . . . [a] proceeding therein."

Second, Canon 3C(1) of the Code of Judicial Conduct, adopted by the American Bar Association in 1972 and by the Judicial Conference of the United States in April 1973, provided that "A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . ." 9/

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9/ Effective December 5, 1974, eight months after Mr. McEwen's appointment, Sec. 455 was amended and this language of Canon 3C(1) was adopted virtually verbatim as the principal standard for judicial disqualification. The Canon has been held to be an aid or guideline in the interpretation of Sec. 455 prior to its amendment. In re Virginia Electric & Power Co., 539 F.2d 357, 361, 366, 369 (4th Cir. 1976).

Third, this Court's 1968 decision in Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, provided significant guidance. There, unknown to the plaintiff, a supposedly neutral arbitrator had in fact been a consultant for the defendant on a regular, if sporadic, basis over a four or five year period up to about a year prior to the arbitration. Neither the arbitrator nor the defendant revealed the relationship to the plaintiff. The governing statute authorized vacation of an arbitration award only where it was "procured by corruption, fraud, or undue means" or "[w]here there was evident partiality . . . in the arbitrators". The district court and Court of Appeals held that the facts of that case did not fall within the statute, but this Court reversed and vacated the award. The Court held that the statute showed Congress' desire to provide for an impartial arbitration and that, even though the record contained no hint of actual fraud or bias (p. 147), the arbitrator had the duty to "disclose to the parties any dealings that might create an impression of possible bias" (p. 149). Referring to the Rules of the American Arbitration Association and the Canons of Judicial Ethics, the Court held that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias" (p. 150).

Justices White and Marshall joined in the lead opinion, and added that arbitrators should "err on the side of disclosure" and that certainly "where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed" (pp. 151-152).

Other decisions of this Court are in

accord. In re Murchison, 349 U.S. 133, 136 ("Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'"); Crites, Inc. v. Prudential Ins. Co., 322 U.S. 408, 414-415 (the court, as well as the parties, "had the right to expect that its officers [there a receiver ] would not . . . fail to reveal any pertinent information or use their official position . . . to further the interests of . . . any associates").

In the present case, Mr. McEwen, as an active officer and director of the Santa Barbara Chamber of Commerce, Inc., with a specific interest in its advertising program, was so connected to the Chace defendants, the Chamber's exclusive advertising agents, that it was improper for him to participate as a judicial officer in a case arising out of a continuing advertising campaign undertaken by Chace on behalf of the Chamber. At the very least, Mr. McEwen had the duty to disclose his active involvement in the Chamber and its advertising program. Indeed, these conclusions seem so self-evident it is disturbing that the courts below were so untroubled by the events of this case that they considered plaintiff's claim frivolous.

3. A party should be able to bring an independent action in equity for relief from a judgment in which a judicial officer who should have been disqualified participated. Fraud is not the exclusive basis for an independent action. 7 Moore's Federal Practice, Par. 60.33, pp. 504-505. Any conduct extrinsic to the

issues in the first action which affects the "integrity of the judicial process" ought to be a sufficient basis for an independent action for equitable relief. See 11 Wright and Miller, Federal Practice and Procedure Sec. 2870, pp. 252-255. 10/

In addition, however, plaintiff's complaint does allege a fraud perpetrated by an officer of the court, and therefore sufficiently alleges a fraud upon the court. 7 Moore's Federal Practice, Sec. 60.33, p. 515. Corruption of a judicial officer is a "clear example" of a fraud on the court. Wilkin v. Sunbeam Corporation, 466 F.2d 714, 717 (10th Cir. 1972); see

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10/ Further, there is no reason why a judicial officer's improper failure to disqualify himself should not be a reason justifying relief from the operation of the judgment under Rule 60(b)(6). See United States Fidelity and Guaranty Co. V. Lawrenson, 334 F.2d 464 (2d Cir. 1964), cert. den., 379 U.S. 869.

*Osborne v. Swope,* 226 F.2d 908 (9th Cir. 1955) ("Obviously the participation of such a prejudiced officer is a 'fraud on the court'"); *Great Coastal Express, Inc. v. International Brotherhood of Teamsters,* 86 F.R.D. 131, 137-138 (E.D.Va. 1980). Cf. *Mixon v. United States,* 620 F.2d 486 (5th Cir. 1980) (treating proceedings and disposition below as a nullity where a magistrate should have been disqualified).

Although one cannot gauge precisely the influence Mr. McEwen's affidavit and interim report had on the district judge who dismissed plaintiff's prior action, clearly it had some significant influence for it was recited in the court's memorandum of decision and cited as one of the bases for the dismissal. Indeed, the district judge was likely to be more influenced by the affidavit and report of the supposedly neutral master he had appointed than by the openly partisan affidavits of defendants' counsel filed in support of dismissal of plaintiff's action. Accordingly, defendants are in no position to dispute Mr. McEwen's influence; the district judge's decision and judgment are tainted and equitable relief from that judgment should have been granted. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 247.

Plaintiff's infringement claims are far from frivolous. The unauthorized use of plaintiff's photographs in Santa Barbara's tourist advertising throughout the country since 1969 has been so widespread that plaintiff filed suits in numerous federal judicial districts, the suits have been consolidated as MDL 450 in the District of Nevada, and the claims are being vigorously pursued.

In sum, the issues raised by this case are of sufficient public importance to warrant the grant of certiorari. The

Court of Appeals has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rules of the U.S. Supreme Court, Rule 17.1(a).

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Ninth Circuit.

December 7, 1981

Respectfully submitted,
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(805) 969-5935

Petitioner Pro Se

# APPENDICES

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

Michael R. Wood, individulaly and
dba National Photo Services,

Appellant,

v.

Willard W. McEwen, Jr., et al

Appellees.
No. 79-4145

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 7, 1981.

Decided May 4, 1981.

The United States District Court for the Central District of California dismissed an action to set aside a prior judgement, and plaintiff appealed. The Court of Appeals held that: (1) District Court has broad discretion to dismiss claim which has no merit; (2) plaintiff's allegations did not provide basis to vacate the prior judgment; (3) district judge properly denied proposed amendments which did not cure deficiencies in complaint; (4) under rule, District Court may limit discovery "for good cause", and may continue to stay discovery when it is convinced that plaintiff will be unable to state claim for relief; (5) affidavit containing only conclusory statements and personal opinions about alleged "close association" between judge and special master failed to allege facts sufficient to substantiate allegation of judicial prefudice, and court properly dismissed motion for disqualification; and (6) court was reluctant to impose penalties against any litigant, particularly one appearing pro se, but same was required by facts in case, including fact that plaintiff continually refused to comply with court's discovery orders, made spurious and unsubstantiated allegations of misconduct against large groups of individuals and organizations, filed 36 other cases which repeatedly raised same claims and continually asserted frivolous grounds of error.

Judgment affirmed; payment of costs by plaintiff ordered.

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Appeal from the United States District Court for the Central District of California.

Before GOODWIN and SNEED, Circuit Judges, and SOLOMON, District Judge.

PER CURIAM

Michael Wood appeals from the district court's dismissal of his action to set aside a prior judgment. THis action and the appeal are frivolous and call for the imposition of damages.

In May, 1972, Wood filed a pro se action against Chace Company Advertising, Inc., and Thomas Chace, alleging copyright infringement, antitrust violations and defamation in connection with photographs that Wood took for Chace.

During the next two years, the parties engaged in discovery and the court held nine hearings on the difficulties which the defendants were experiencing in obtaining discovery from Wood. The defendants complained of Wood's recalcitrance. They requested the appointment of a special master to supervise discovery. At their suggestion, District Judge Robert J. Kelleher appointed Willard W. McEwen, Jr., a part-time United States Magistrate as special master.

Notwithstanding McEwen's supervision, Wood continued to refuse to participate in discovery. During his deposition, he refused to abide by McEwen's rulings and refused to produce documents, even though he had already stipulated to their discovery.

The defendants filed an ex parte application to dismiss the action and filed McEwen's report and affidavit in support of the application. Judge Kelleher denied it, but issued an order requiring Wood to show cause why his action should not be dismissed for failure to comply with the court's orders. On May 6, 1974, after a hearing in which Wood actively participated, the court stated:

> This Court has on many occasions indulged various shortcomings on behalf of Wood, in the belief that, despite the difficulties presented, the plaintiff should be allowed to proceed in propria persona . . . Now, howver . . . the Court has come to the conclusion that wilfullness[°]

> is involved . . .To allow plintiff to continue . . .would constitute this Court's tolerance and acquiescence in an abuse of the processes of the United States District Courts. This Court cannot, and will not, tolerate that abuse.

The court entered a judgment dismissing the action with prejudice.

Wood appealed the judgment to this Court and WE AFFIRMED. WOOD THEN PETITIONED THE SUPREME court for a writ of certiorari. The petition was denied in 1975.

In May, 1977, three years after the district court's dismissal of the action. Wood filed another action in the district court in which he alleged that the earlier judgment was the result of a "fraud upon the court" under Rule 60(b)(3) and (6), Federal Rules of Civil Procedure./1 Wood amended the complaint before serving it.

In the first amended complaint, Wood named the original defendants, their attorneys, McEwen, the Santa Barbara Chamber of Commerce, the Better Business Bureau of the Tri-Counties, and insurance companies which insured the original defendants. Wood alleged that the defendants had conspired to have McEwen appointed as special master; that McEwen's failure to disclose his association with the Santa Barbara Chamber of Commerce was a fraud on the court and that McEwen's affidavit was false and perjured.

The defendants moved to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim on which releif could be granted. District Judge Francis C. Whelan issued a protective order suspending discovery until he decided these motions. On

December 22, 1977, Judge Whelan granted all the defendants' motions and dismissed the complaint.

In May, 1978, Wood moved to file a second amended complaint. This amendment sought to add more than 100 defendants and to assert twenty-nine causes of action, most of which Judge Kelleher had dismissed in 1974. The only significant addition was an allegation that McEwen had a pecuniary interest in the action which Judge Kelleher had dismissed. After a full hearing, Judge Whelan denied this motion to amend.

In July, 1978, Wood sought to file a third amended complaint which again restated the allegations of the complaint which Judge Kelleher had dismissed. After a heraing, Judge Whelan denied this application.

In October, 1978, Wood sought to file a fourth amended complaint which repeated the allegations of the other proposed complaints. Before the court could rule on this motion, Wood filed applications to disqualify all the Judges in the Central District of California and to transfer the case to the District of Nevada.

On February 22, 1979, Judge Whelan denied Wood's motions to disqualify and to transfer. After a hearing, he denied the motion to amend for failure to allege a specific act of fraud upon which relief could be granted and entered a judgment of dismissal.

---

1/ This rule provides that a "court may relieve a party. . . from a final judgment . . .for . . .(3) fraud . . .(whether . . intrinsic or extrinsic) . . . or (6) any other reason justifying relief . . . " But, "[t]his rule does not limit the power of a court to entertain an idependent action to relieve a party from a judgment, order, or proceeding . . .for fraud upon the court." A Rule 60(b)(3) motion must be brought within one year after the judgment is entered but there is no time limit for bringing an independent action.

Wood brought an emergency motion in this Court to stay Judge Whelan's orders and judgment. We denied the motion.

Wood appealed from the judgment. In this Court, he filed a document stating that he has filed thirty-six other actions in thirty one different districts in nine different circuits. These actions name 253 defendants and involve claims similar to those Judge Kelleher dismissed in 1974.

[1] Wood contends that Judge Whelan erred in granting appellees' 12(b)(6) motions. A district court has broad discretion to dismiss a claim, when, as here, it has no merit. 2A Moore's Federal Practice Par. 12.08 at 2271.

[2] Rule 60(b)(3) provides that a judgment may be set aside for an adverse party's fraud if a motion is made within one year after the entry of the judgment aought to be set aside. Here, Wood did not file his motion for almost three years

after the judgment was entered. Wood's motion, therefore, cannot be granted under Rule 60(b)(3).

[3] Rule 60(b) also provides that a court may consider an independent action to set aside a judgment for fraud on the court. Although there is no time limit for these actions, they may be maintained only for extrinsic fraud. Independence Lead Mines Co. v. Kingsbury, 175 F.2d 938, 985 (9th Cir. 1949).

Wood's first amended complaint and all proposed amendments, contained two grounds for setting aside the judgment:

(1) Appellees conspired to have McEwen appointed special master and McEwen's conflict of interest in the outcome, because of his involvement in the Santa Barbara Chamber of Commerce, precluded Wood from fairly presenting his claims, and

(2) McEwen filed a false and perjured

affidavit regarding Wood's conduct during discovery which resulted in the dismissal.

Judge Kelleher dismissed the action because of Wood's conduct both before and after McEwen's appointment and for Wood's failure to comply with the court's orders. Wood does not attempt to justify his refusal to comply with the court's orders nor does he deny that he refused to permit discovery.

[4] Even if we could disregard Judge Kelleher's grounds for dismissing the action, Wood's allegations do not provide a basis to vacate the prior judgment. His allegation of McEwen's membership in the Chamber of Commerce, an organization that was not even a party to the action, does not support an allegation of a conflict of interest and does not indicate either extrinsic fraud or fraud on the court. See Keys v. Dunbar, 405 F.2d 955 (9th Cir.), cert. denied, 396 U.S. 880, 90

S.Ct. 158, 24 L.Ed.2d 138 (1969); England v. Doyle, 281 F.2d 304 (9th Cir. 1969).

[5] Extrinsic fraud is conduct which prevents a party form presenting his claim in court. Green v. Ancora-Citroneile Corp., 577 F.2d 1380, 1384 (9th Cir. 1978). At the hearing at which Judge Kelleher considered McEwen's report, Wood fully participated in the proceedings. Wood's allegation of perjury does not raise an issue of extrinsic fraud. At most it raises an issue of intrinsic fraud and does not provide a substantive ground for relief. Independence Lead Mines Co. v. Kingsbury, supra.

Wood asserts many other claims of error, some of which we shall discuss briefly and all of which are without merit.

[6] Wood complains that Judge Whelan erred in not allowing him to amend his complaint. Under rule 15, Federal Rules

of Civil Procedure, a party has the right to amend his pleading once and thereafter the matter is within the court's discretion. Wood amended once as of right before he served the complaint. Judge Kelleher had dismissed in the prior action the material allegations of the complaint and proposed amendments. In the action before Judge Whelan, Wood failed to specifically allege facts that presented substantive grounds for an action for fraud on the court Judge Whelan poperly denied the proposed amendments which did not cure these deficiencies. See Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed2d 222 (1962).

[7] Moreover, the court held hearings on each motion and informed Wood of the reasons for its action. The court was not required to issue a formal memorandum on each occasion. Komie v. Buehle Corp., 449 F.2d 644, 648 (9th Cir. 1971)

[8,9] Wood also contends that Judge Whelan erred in issuing the protective order. A district court may limit discovery "for good cause", Rule 26(c)(4), Federal Rules of Civil Procedure, and may continue to stay discovery when it is convinced that the plaintiff will be unable to state a claim for relief. B.R.S. Land Investors v. United States, 596 F.2d 353 (9th Cir. 1978). When the court suspended discovery, there was a real question whether Wood's claim presented a substantive basis for vacating the judgment; at no time has Wood alleged that any prejudice resulted from the order. The court did not abuse its discretion in issuing the protective order staying discovery.

[10] Wood contends that Judge Whelan erred in denying his motion to transfer the action to the District of Nevada. Wood's only argument to justify transger

is that he would not receive a fair trial in the Central District of California because of McEwen's "close association" with the judges of that district. Wood and all appellees are residents of the Central District of California and the alleged fraud took place in that district. Transfer to Nevada would have been a complete waste of time the court properly denied it.

[11] Wood contends that Judge Whelan abused his discretion in failing to disqualify himself. Wood bases this argument on his allegations of a "close association" between Judge Whelan and McEwen and "prejudgment bias" caused by a letter from Aetna's counsel sugjesting that the case be transferred to Judge Kelleher.

This issue is irrelevant to an appeal from a dismissal under Rule 12(b)(6), but even if it were relevant, Wood did not meet the requirements for disqualifying a presiding judge must be "timely," "sufficient," and accompanied by an affidavit made in "good faith" stating the facts upon which the motion is made. 28 U.S.C. Sec. 144. Wood did not move for disqualification until sixteen months after the alleged grounds for disqualification arose. He therefore waived that privilege. Lucas v. United States, 325 F.2d 867, 869 (9th Cir. 1963). In addition, Wood did not raise the issue until it was clear that the court intended to dismiss his underlying claim without leave to amend. Wood attempted to use the statute to avoid dismissal on the merits.

[12,13] 28 U.S.C. Sec. 455 requires a judge to disqualify hiself "at any proceeding at which his impartiality might reasonbly be questioned." The moving party must allege facts from which a reasonable man would fairly infer that a

judge is peronally and extra-judicially biased or prejudiced. United States v. Caringnan Co., 600 F.2d 762, 763 (9th Cir. 1979). Wood's affidavit contains only conclusionary statements and personal opinions about the alleged "close association." The attorney's letter is a communication under Local Rule 2(g)(7). Wood's affidavit fails to allege facts sufficient to substantiate his allegation of judicial prejudice and the court properly dismissed the motion. United States v. Azhocar, 581 F.2d 735 (9th Cir. 1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979).

[14] Appellees contend that they are entitled to costs and attorney's fees on appeal. Rule 38, Federal Rules of Appellate Procedure. Although we are reluctant to impose penalties against any litigant, particularly one appearing pro se, the facts in this case require that we

do it.

In the first action, Wood continually refused to comply with the court's discovery orders. In this action, he has made spurious and unsubstantiated allegations of misconduct against large groups of individuals and organizations. The filing of this and thirty-six other cases, which repeatedly raise the same claims, has become burdensome and costly to the litigants. Wood continually asserts frivolous grounds of error.

A penalty is justified in favor of those litigants who have been needlessly put to trouble and expense. Wood himself recognizes the propriety of such action because he seeks attorney's fees and costs against appellees.

The judgment is affirmed. Wood is ordered to pay $1,250 as damages including attorney's fees and costs to each group of appellees which filed a brief in this action other than to McEwen [2] who shall be entitled to costs only.

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[2] Briefs were filed for five groups of appellees: (a) Santa Barbara Chamber of Commerce and All Year Association, Inc. (b) Chace Company Advertising, Inc.; Thomas Cahce; Hugh J. Haferkamp, Hollister, Brace & Angle; Hollister & Brace, Inc.; George A. Rempe, III; and J. James Hollister, III. (c) Aetna Life and Casualty Co.; Cavalletto, Webster, Mullen & McCaughey; and James W. Brown. (d) Better Busienss Bureau of the Tri-Counties; Hartford Accident & INdemnity Co.; and Monte L. Widders. (e) Willard W. McEwen.

## APPENDIX B

FILED
AUG. 10 1981
RICHARD H. DEANE
Clerk U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| MICHAEL R. WOOD,<br>dba NATIONAL PHOTO<br>SERVICES,<br>Appellant,<br>vs.<br>WILLARD W. McEWEN,<br>JR., et al.<br>Appellees | No. 79-4145<br>ORDER |

Before: GOODWIN and SNEED, Circuit Judges, and SOLOMON,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Goodwin and Sneed vote to reject the suggestion for rehearing en banc and Judge Solomon so recommends.

The full court has been advised of

the suggestion for rehearing en banc, and no judge has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

## APPENDIX C

FILED
FEB 23 1979
CLERK U.S. DISTRICT COURT
Central District of California

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, individually and dba NATIONAL PHOTO SERVICES, ) NO. CV 77-1762-FW

Plaintiff,

vs. ) MEMORANDUM OF DECISION

WILLARD E. McEWEN, JR., et al.,

Defendants.

In this action plaintiff filed his complaint seeking to vacate a judgment of another Judge of this Court in action No. 72-1179-RJK, such latter action being entitled Michael R, Wood,dba National

Photo Services, plaintiff, vs. Chace Company Advertising, Inc., a corporation; Thomas Chace, an individual;and Better Business Bureau of Santa Barbara, Inc., a corporation. Plaintiff's allagations in his complaint herein allege that the earlier judgment was procured by fraud. The law is, of course, clear that a collateral attack on a judgment must be founded upon extrinsic fraud and that intrinsic fraud can only be presented in the action wherein the judgment which is attacked was entered and that such claim of intrinsic fraud can there only be asserted when presented in a timely manner. In the instant action the time for such claim of intrinsic fraud has long since passed.

This Court has from time to time rendered its decisions dismissing the action, first as to some defendants and later as to other defendants. No judgment of the Court has been entered for the reason that by the time that the Court had rendered its decision in favor of all of the defendants, plaintiff began to present motions for leave to file amended complaints. The Court has successively denied leave to file Second and Third Amended Complaints presented by plaintiff. Now the plaintiff has filed a motion for leave to file a Fourth Amended Complaint. The Court has considered the proposed Fourth Amended Complaint and is of the opinion that plaintiff's motion should be denied for the reason that it does not set forth facts sufficient to establish a claim for relief.

Plaintiff asserts in each of these proposed amended complaints that the defendants conspired to commit extrinsic fraud upon the Court in the earlier numbered action wherein judgment of dismissal was entered against plaintiff.

However, plaintiff does also claim that there was intrinsic fraud exercised in the earlier action. It is clear from the record that if there was any fraud, and the plaintiff has not alleged any factual basis for his claim, that it would have been intrinsic and not extrinsic fraud that was practiced.

First of all, all of the defendants except defendants Chace and the Better Business Bureau were not parties to the earlier proceeding and therefore are not properly sued in this action which is an action collaterally attackin the judgment in the prior action. The Court in the prior action took no actionwhatsoever in favor of the remaining defendants so that it is frivolous on the part of plaintiff to join them in this action. Next, his complaint in the instant action is that Willard E. McEwen, Jr., who is improperly sued as a defendant in this action, was appointed as a Special Master in charge of discovery by the trial Judge in the prior action and properly should not have been acting as such Special Master for the reason that at the time he was a Director of the Santa Barbara Chamber of Commerce, Inc. He does not present any factual allegation to show that there was any reason why McEwen could not properly have served as such Special Master.

Further, there is no showing by plaintiff of any extrinsic fraud on the part of either defendant Chace or defendant Better Business Bureau which was aided or abetted by McEwen in his conduct as Special Master. Further, if McEwen did participate, and this Court has no factual allegations to the effect that he did submitted by plaintiff, it would have been in the nature of intrinsic fraud upon the Court rather than extrinsic fraud.

It should be noted that plaintiff

herein had an opportunity in the prior action at a hearing on May 6, 1974, to show cause why plaintiff's earlier action should not be dismissed. It is interesting to note that plaintiff does not allege that he told the Court in the earlier proceeding on May 6, 1974, that McEwen's report to the Court on the status of discovery was in error.

The Court was concerned in the earlier proceeding with its own attempts to secure adherence by plaintiff to the rules of discovery and the Court stated in its Memorandum of Decision of May 23, 1974, that the action should be dismissed based upon "all of the above." The words "all of the above" refer not only to the report of the Special Master but to the entire history of the case of plaintiff's obstruction to discovery within the Court's personal knowledge.

If plaintiff wishes to take issue

with the accuracy of the McEwen report it should have been done in the prior action. It cannot be a basis for a proceeding to collaterally attack the earlier judgment in this case.

For the reasons set forth herein the Court will deny plaintiff's motion to file a Fourth Amended Complaint and plaintiff's motion for transfer of this action to the United States District Court for the District of Nevada, and will enter judgment in favor of all of the defendants.

DATED: February 22, 1979.

/s/ Francis C. Whelan

FRANCIS C. WHELAN
United States District Judge

## APPENDIX D

FILED
FEB. 23 1979
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, )
individually and ) NO. CV 77-1762-FW
dba NATIONAL PHOTO )
SERVICES, )
)
Plaintiff, )
vs. )
) JUDGMENT
) DISMISSING ACTION
WILLARD E. McEWEN, )
JR., et al., )
)
Defendants.)
)

In this action the Court has heretofore decided that plaintiff's original Complaint, First Amemded Complaint, proposed Second Amended Complaint and proposed Third Amended Complaint, do not set forth facts upon which a cause of action is stated against defendants or any of them. The court has now made a similar ruling with respect to plaintiff's proposed Fourth Amended Complaint. It is clear from the record that the action should now be dismissed without further leave to amend. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that this action is dismissed.

Dated this 22 day of February, 1979.

/s/ Francis C. Whelan

FRANCIS C. WHELAN
United States District Judge

# Opposition

## 1

NO. 81-1070

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MICHAEL R. WOOD, individually and dba

NATIONAL PHOTO SERVICES,

Petitioner,

-vs-

WILLARD W. McEWEN, JR., et al.,

Respondents.

---

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MYERS, WIDDERS & GIBSON
260 Maple Court, Suite 231
Ventura, California 93003
805:644-7188

Attorneys for Respondents,
Better Business Bureau of
the Tri-Counties, Inc.,
Hartford Accident &
Indemnity Co. and
Monte L. Widders

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No. 81-1070

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MICHAEL R. WOOD, individually and d/b/a
NATIONAL PHOTO SERVICE,

Petitioner,

v.

WILLARD W. McEWEN, JR., et al.,

Respondents.

---

Respondents, Better Business Bureau of the Tri-Counties, Inc., Hartford Accident & Indemnity Co. and Monte L. Widders, respectfully pray that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 4, 1981 be denied.

## STATUTES AND RULES INVOLVED

Petitioner has set forth accurately 28 U.S.C. §455 and Rule 60(b) of the Federal Rules of Civil Procedure.

Petitioner's complaint was dismissed by the Trial Court pursuant to Rule 12(b)(6) Federal Rules of Civil Procedure which provides as follows:

> "(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . ."

## STATEMENT OF THE CASE

This petition arises from the dismissal by the District Court of Petitioner's independent action to set aside an earlier judgment of the same District Court entered in a different action. After five rulings and four separate efforts by Petitioner failed to state a claim upon which relief could be granted, the District Court entered its judgment dismissing the action on February 27, 1979.

The events with which this action is concerned commenced on May 25, 1972 when

Petitioner (hereinafter referred to as "Plaintiff") filed a complaint in the United States District Court for the Central District of California alleging four separate causes of action. The complaint named as Defendants Chase Company Advertising, Inc., Thomas Chace and Better Business Bureau of Santa Barbara, Inc. (hereinafter collectively referred to as "Defendants"). The original complaint was prepared by an attorney admitted to practice in the District Court. However, shortly after the commencement of the action the attorney was substituted out by Plaintiff who at all times thereafter prosecuted his case _in propria persona_. The action was subsequently assigned to the calendar of the Honorable Robert J. Kelleher who supervised all proceedings in that action (hereinafter referred to as the "Kelleher Complaint").

The first cause of action of the Kelleher Complaint was for copyright infringement and unfair competition against Defendants, Chace Company Advertising, Inc. and Thomas Chace (hereinafter referred to collectively as

"Chace"). The complaint alleged that Chace had wrongfully reproduced without Plaintiff's permission a photograph taken by Plaintiff pursuant to Chace's commission.

The second cause of action was for antitrust violations and alleged group boycott and stated in substance that all Defendants had published a letter prepared by Chace encouraging a boycott of Plaintiff's photography business.

The Kelleher Complaint is significant from two standpoints. First, the complaint does not allege that Chace at any time was acting as an advertising agent of the Santa Barbara Chamber of Commerce. Secondly, the thrust of the Kelleher Complaint was the alleged boycott causes of action. The alleged copyright violations were a peripheral issue.

By reason of the difficulties imposed by Plaintiff's attitude and actions relating to discovery procedures during the initial phases of the litigation, including the filing of voluminous and repetitive requests for admissions and interrogatories as well as the noticing of the depositions of numerous witnesses and parties without regard to the Federal Rules of Civil Procedure, Defendants requested the appointment of a Special Master for the sole purpose of supervising discovery in Santa Barbara.

Defendants suggested the appointment of the Honorable Willard W. McEwen, Jr., a part-time United States Magistrate, as a Special Master. On April 1, 1974 Judge Kelleher ordered the appointment of Mr. McEwen as a Special Master with his fees and expenses to be taxed as costs but initially advanced one-third by each of the three parties.[1]

Despite the appointment of the Special Master and his supervision over discovery, Defendants were generally frustrated in their efforts to obtain information and documents from Plaintiff, including an outright refusal of Plaintiff to obey an order of the Special Master relative to the production of documents.

---

[1] It is interesting to note that while Plaintiff indicates that Mr. McEwen's fees were to be taxed equally between the three parties, he fails to mention that he failed to pay his share of those fees.

Defendants, therefore, made an ex parte application to Judge Kelleher on April 29, 1979 for an order under Rule 37(b), Federal Rules of Civil Procedure, dismissing the action because of Plaintiff's continuing failure to permit discovery. Magistrate McEwen submitted in support of the application by Defendants an "Affidavit and Interim Report of Special Master".

At the time of the hearing on the application of Defendants, Judge Kelleher denied the application but at the same time issued an order to Plaintiff to show cause why his failure to comply with discovery orders should not cause the Court to dismiss his action. Both Defendants and Plaintiff were given an opportunity to file any material they desired in support of or in opposition to the order to show cause and a hearing was scheduled on said order for May 6, 1974. After reviewing all of the documents presented by both Plaintiff and Defendants and hearing oral argument by all parties, Judge Kelleher dismissed Plaintiff's action with prejudice.

Plaintiff thereafter filed an appeal in the Ninth Circuit Court of Appeals from the judgment of the District Court dismissing the action which dismissal was entered on June 10, 1974. Plaintiff's appeal from the Kelleher judgment was dismissed on April 21, 1975 by the Ninth Circuit for failure to prosecute in accordance with the Federal Rules of Appellate Procedure.

Appellant thereafter petitioned this Court for a writ of certiorari relative to the judgment in the Kelleher action and the dismissal of his appeal by the Ninth Circuit. Such petition was denied by this Court on November 3, 1975. Plaintiff's proceedings pursuant to the Kelleher action were thereby terminated.

On May 16, 1977, more than three years after the dismissal of the Kelleher action, the action which is the subject of this petition was filed in the District Court.[2] Before service of the original complaint, Plaintiff exercised his right to amend his pleadings "once as a matter of course at any time before a responsive pleading is served" (Emphasis added.) (Rule 15(a)) by filing a first amended complaint on August 29, 1977. This complaint was duly docketed on the calendar of the Honorable Francis C. Whelan (hereinafter referred as the "Whelan Complaint").

Defendants in the Whelan Complaint filed motions under Rules 12(b)(6) and 21 attacking that complaint. On December 22, 1977, Judge Whelan filed a Memorandum of Decision granting the Defendants' motions to dismiss the action subject to the filing of a formal order of dismissal.

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[2] Plaintiff has never adequately explained the substantial delay in filing his independent action other than to say he "suddenly" discovered that McEwen was involved with the Santa Barbara Chamber of Commerce.

Thereafter, Plaintiff made several efforts to file additional amended complaints. On each occasion, Plaintiff lodged proposed amended complaints for review by the Court prior to its formal order being filed. On May 25, 1978, Plaintiff filed a motion requesting leave to file a proposed second amended complaint, which motion was denied on June 19, 1978. On June 26, 1978, Plaintiff filed a motion for reconsideration of that order, which motion was denied on July 11, 1978. On July 14, 1978, Plaintiff filed a motion for leave to file a proposed third amended complaint, which motion was denied on September 29, 1978. On October 11, 1978, Plaintiff filed yet another motion for leave to file a proposed fourth amended complaint. Subsequent thereto on January 30, 1979, Plaintiff filed for the first time a motion to disqualify Judge Whelan on the grounds of his prejudice. At the same time, Plaintiff also filed an application to disqualify all United States District Judges sitting in the Central

District of California with respect to the Whelan Complaint on grounds of their prejudice toward him and to transfer the entire action to the United States Court for the District of Nevada.

On February 22, 1979, Judge Whelan held a hearing on Plaintiff's various motions, including his motion to transfer the action to the United States District Court for the District of Nevada. All motions were denied. After those decisions, Judge Whelan signed the judgment dismissing the action which was filed on February 23, 1979 and entered on February 27, 1979.

Plaintiff shortly thereafter made a so-called emergency motion for stay of Judge Whelan's orders and judgment to the Ninth Circuit Court of Appeals. On March 13, 1979, the Justices Wallace and Hug denied Plaintiff's emergency motion and notified him that he should appeal from Judge Whelan's judgment. On March 22, 1979, Plaintiff filed his notice of appeal in the Ninth Circuit.

However, not to be thwarted by the judgments of dismissal entered in the two California actions, Plaintiff, on January 2, 1979, filed in the District Court for the District of Nevada a complaint alleging antitrust violations and copyright infringements and fraud against the Defendants in the original two California actions and adding thereto some additional 240 Defendants, primarily newspapers and magazines. The complaint, substantially more voluminous than his previous efforts, set forth basically the same causes of action as his two actions in California.

Substantially all of the Defendants in the Nevada action moved the Honorable Roger D. Foley to either dismiss or transfer those actions back to California. On the 17th day of December, 1980, Judge Foley granted Defendants' motion to dismiss on the grounds that Plaintiff's complaint failed to state claims upon which relief could be granted as well as on the basis of various statute of limitations and jurisdictional defects. A judgment to dismiss was entered on April 24, 1981. Plaintiff is presently appealing Judge Foley's ruling to the Ninth Circuit Court of Appeals.

However, perhaps anticipating Judge Foley's ruling, Plaintiff filed, in early 1981, some 36 actions in various District Courts in the United States alleging the same antitrust and copyright causes of action and again suing numerous defendants. These actions have been ordered consolidated for pre-trial purposes by the Federal Multidistrict Panel (MDL 450) before the Honorable Roger D. Foley in the District Court for the District of Nevada.[3]

On May 4, 1981, the Ninth Circuit Court of Appeals entered its per curiam opinion affirming Judge Whelan's decision, and with respect to the issues relevant to this petition, providing that McEwen's membership in the Santa Barbara Chamber of Commerce did not constitute a disqualifying conflict of interest with respect to his duties as a Special Master nor did his failure to disclose such membership indicate extrinsic fraud or fraud upon the Court. The Court of Appeals correctly pointed out that the District Court had broad discretion under Rule 12(b)(6), Federal Rules of Civil Procedure, to dismiss actions which are devoid of merit.

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[3] It is significant that on May 29, 1981 Judge Foley issued an unusual injunctive order which prohibits Plaintiff from filing further like actions either in Federal or state Court.

It is significant that the Ninth Circuit, after an exhaustive review of the litigious activities of Plaintiff over a nine-year period, imposed monetary sanctions on Plaintiff, explaining their imposition as follows:

> "In the first action, Wood continually refused to comply with the court's discovery orders. In this action, he has made spurious and unsubstantiated allegations of misconduct against large groups of individuals and organizations. The filing of this and thirty-six other cases, which repeatedly raise the same claims, has become burdensome and costly to the litigants. Wood continually asserts frivolous grounds of error.

> "A penalty is justified in favor of those litigants who had been needlessly put to trouble and expense. Wood himself recognizes the propriety of such action because he seeks attorney's fees and costs against appellees."

On August 10, 1981, the Ninth Circuit denied Plaintiff's application for rehearing _en banc_.

On December 7, 1981, Plaintiff filed his petition for writ of certiorari with this Court.

## REASONS FOR DENYING THE WRIT

### THE COURT OF APPEALS' AFFIRMATION OF THE DISTRICT COURT'S DISMISSAL IS NOT SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

## ARGUMENT

## MR. McEWEN HAD NO OBLIGATIONS TO DISQUALIFY HIMSELF AS A SPECIAL MASTER OR TO ADVISE THE COURT OR PLAINTIFF THAT HE WAS AN OFFICER AND DIRECTOR OF THE SANTA BARBARA CHAMBER OF COMMERCE.

The primary issue raised by Plaintiff in his petition is that Mr. McEwen, at the time he was appointed Special Master to supervise discovery in the Whelan action, was obligated to advise the Court and Plaintiff that he was an officer and director of the Santa Barbara Chamber of Commerce. Plaintiff contends that McEwen's position with the Chamber of Commerce constituted such a conflict of interest, had it been disclosed to the District Court, would have necessarily caused his disqualification as a Master to supervise discovery.

Plaintiff further contends that the Ninth Circuit sanction of the District Court's dismissal of Plaintiff's contention with respect to McEwen's disqualifying status constitutes such a "blemish" on the integrity of the Federal judicial process that this Court should assert its jurisdiction.

For support of this proposition, Plaintiff invokes the United States Supreme Court case in Commonwealth Coatings Corp. v. Continental Casualty Company, 393 U.S. 145 (1968). However, Commonwealth Coatings is entirely distinguishable from the case at hand and in no way persuasive.

The Commonwealth Coatings case involved the validity of a decision made by a "neutral" arbitrator in a commercial arbitration case. The arbitrator in question, notwithstanding substantial prior contemporaneous business dealings with one of the parties to the arbitration, sat in judgment on the case and participated in making the award. The Court, noting that arbitrators decide both the law and the facts of the matter submitted to them, held that the substantial business dealings between the "neutral" arbitrator and one of the parties to the arbitration were sufficiently extensive that the failure to disclose such dealings to the other side prior to the arbitration rendered the award voidable upon petition to the District Court by the losing party.

The facts with respect to the case at bar are substantially different. First, Mr. McEwen was sitting as a Special Master without any authority to make any decisions or recommendations concerning the merits of the case itself. McEwen's sole role was to preside over the discovery proceedings in Santa Barbara. At no time was McEwen in a position, nor was it contemplated that he would be in a position, to even make recommendations concerning disposition of the case to Judge Kelleher. Consequently, Mr. McEwen's appointment was not in anyway related to the merits of the case then pending before Judge Kelleher.

Secondly, McEwen's affiliation with the Chamber of Commerce as an officer and director does not give rise to any financial interest to the subject matter of the action as it stood in April, 1974. There is no suggestion that McEwen would have had incurred any financial reward even if the Chamber of Commerce had been involved in the action as a party, which is was not. Neither is it alleged that McEwen would have suffered any personal financial detriment had Plaintiff prevailed. It has been held that mere membership in an organization is not grounds for disqualification even if that organization is a party to the action pending. Parrish v. Board of Commissioners of Alabama State Bar, 524 F.2d 98 (5th Cir. 1975); Plechner v. Widener College, Inc., 569 F.2d 1250 (3rd Cir. 1977).

This substantial lack of any significant financial interest in the outcome of the case is, in fact, the distinguishing factor with respect to the case of Crites, Inc. v. Prudential Insurance Co., 322 U.S. 408 (1943) also cited by Plaintiff. In the Crites case, this Court surcharged a receiver appointed by a Federal District Court who, through a private agreement made prior to the foreclosure sale of certain properties in receivership, derived a profit from their subsequent resale. The obvious financial interest of the receiver, an officer of the Court, was the basis for the Court's holding. The Court stated, at Page 414:

> "The court, as well as all the interested parties, had the right to expect that its officers would not make undisclosed private agreements, fail to reveal any pertinent information or use their official positions for their own profit or to further the interests of themselves or any associates." (Emphasis added.)

Plaintiff also relies heavily on the standards for judicial disqualification set forth in 28 U.S.C. §455.

It should be noted initially, however, that the legal standards for disqualification relative to Special Masters are not nearly as stringent as the standards set forth for judges. The most recent decision to consider the subject is Morgan v. Kerrigan, (1st Cir. 1976), 530 F.2d 401, cert. den., 426 U.S. 935. The Court therein stated:

> "Since masters and experts are subject to the control of the court and since there is a need to hire individuals with expertise in particular subject matters, masters and experts have not been held to the strict standard of impartiality that are applied to judges." 530 F.2d at 426.

However, even assuming that the strict standards of §455 as it existed at the time of McEwen's appointment should be applied to determine if McEwen's status with the Chamber of Commerce was disqualifying, the test would be whether or not he had either a "substantial interest in the pending litigation" or "is so related to or connected with any party or his attorney as to render it improper in his opinion for him to sit on the trial, appeal or proceeding therein".

The type of "substantial interest" which has been found to be disqualifying for judges has been consistently defined by the Courts as pecuniary interests or advantage. In re Grand Jury Investigation (3rd Cir. 1973), 46 F.2d 1013, 1016.

There are simply no facts or allegations set forth by Plaintiff in any of the amended complaints that could be taken to allege a personal or pecuniary interest in the subject matter of the action. The Santa Barbara Chamber of Commerce is a general non-profit civic organization which makes no financial distribution to its members. The funds for the All-Year Association were derived from tax revenues collected by the City of Santa Barbara. Neither the Chamber of Commerce nor the All-Year Association were parties to the original action and neither had anything whatsoever to gain or lose as a result of the original litigation. Further, this Court can take judicial notice that McEwen's position with the Chamber was voluntary and unpaid.

Plaintiff's allegations of McEwen's disqualifying interest is similar to that made by the plaintiff in the Pelchner case, supra. There the plaintiff alleged that the Judge's membership in the American Bar Association constituted a "financial interest" sufficient to disqualify him. The Court noted that the

American Bar Association was a non-profit corporation, that upon its dissolution none of its property would accrue to its members and that further the fact that it had numerous members other than the Trial Judge rendered his membership in the Association non-disqualifying.

The second aspect of §455 deals with the "relationship" between the Judge and a witness or party. It should be noted initially that the disqualification standard relates to a relationship which, in the concerned Judge's own opinion, renders it improper for him to sit. That means that, assuming that the "relationship" portion of §455 was applicable, it was the judgment of McEwen that was controlling with respect to that relationship as to whether it was disqualifying. United States v. Ritter, 540 F.2d 459, 462 (10th Cir. 1976).

Plaintiff argues in his petition that, because a so-called subsidiary of the Chamber of Commerce, the All-Year Association, employed two of the Defendants to render advertising services and because one of Plaintiff's causes of action in the Kelleher Complaint involved a claim of copyright violation arising out of an advertising campaign authorized by the All-Year Association, this rendered McEwen so related to or connected with the Chace Defendants as to compel his disclosure of these facts and his failure to disqualify himself in light of them constitutes an abuse of discretion. This type of allegation is similar to that made by the plaintiff in the case of Scarrelia v. Midwest Federal Savings and Loan (8th Cir. 1976), 536 F.2d 1207 where the plaintiff charged that, as all members of the Court of Appeals were members of local bar associations they therefore had a "unique relationship" to the members of the legal profession and should therefore disqualify themselves. This general allegation was found totally insufficient.

Based upon the foregoing, there was nothing in the circumstances of the original action which required the disqualification of Mr. McEwen. Additionally, there was nothing in those circumstances which required that he give any advice to Plaintiff relative to his activities in the Santa Barbara Chamber of Commerce. Even under today's "reasonable man" standard, no reasonable person could presumably conclude that there is any appearance of impropriety by Mr. McEwen, a United States Magistrate, undertaking the obviously unrelated position of supervising discovery proceedings when neither the Santa Barbara Chamber of Commerce nor the All-Year Association was a party to the action.

## EVEN ASSUMING McEWEN HAD A DISQUALIFYING INTEREST, PLAINTIFF FAILED TO MEET ALL OF THE ESTABLISHED REQUIREMENTS FOR RELIEF PURSAUNT TO AN INDEPENDENT ACTION IN EQUITY TO SET ASIDE A JUDGMENT.

It is important to note that Plaintiff brought an independent action "in equity" to set aside a judgment and did not make a motion in the original action to set aside the judgment previously entered. Although the provisions of Rule 60(b)(6), Federal Rules of Civil Procedure, may be similar in operation to an independent action, it is clear that the standards for the application of either remedial provision were not met by Plaintiff.

The requirements that must be established to secure relief pursuant to an independent action are discussed in Bankers Mortgage Company v. United States, 423 F.2d 73 (5th Cir. 1970). Those requirements are: (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense with respect to a claim upon which the judgment was entered; (3) fraud, accident or mistake which prevented the losing party in the judgment from presenting his defense against the claim for which the judgment was entered; (4) the absence of fault or negligence on the part of the losing party; and (5) the absence of any adequate remedy at law.

The important point with respect to the case at bar is that Plaintiff must establish by factual allegations that the alleged conduct of McEwen "prevented (him) from fully and fairly representing his case or defense". Keyes v. Dunbar, 405 F.2d 955, 957, 958 (9th Cir. 1969).

Thus, the pivotal question for the District Court was whether the Special Master's "status" with the Chamber of Commerce or his failure to disclose that status prevented Plaintiff from fully and fairly presenting his case at the hearing on Judge Kelleher's order to show cause on May 6, 1974.

In this regard, it is extremely important to understand that Plaintiff's action was dismissed by Judge Kelleher not because of any specific ruling made by the Special Master, but based upon the evidence given at the May 6, 1974 hearing, together with the information that had been previously accumulated by Judge Kelleher prior to the appointment of the Special Master. Judge Whelan took formal note of that fact and specifically commented on it in his Memorandum of Decision.

The crucial point is that Plaintiff failed to allege how or in what way he was hampered or thwarted in his ability to present fully and fairly his case at the hearing on the order to show cause because of McEwen's alleged partiality.

An analysis of the record establishes without a doubt that it was not by virtue of McEwen's appointment or his interest in the Chamber of Commerce that Plaintiff was deprived of his "day in court". The uncontroverted facts were that Plaintiff's case was dismissed solely because of his own activities and that he did, indeed, have a fair and full hearing and numerous chances to explain his actions during the discovery process.

Further, in order for Plaintiff to secure intervention by a Court of equity, he should show that the judgment against him was not taken by reason of any fault of his own.

However, it is clear from the record that he was guilty of protracted and repetitive breaches of orders and rules of Court many of which occurred prior to the appointment of McEwen. As the Ninth Circuit itself stated, "Judge Kelleher dismissed the action because of Wood's conduct both before and after McEwen's appointment and for Wood's failure to comply with the court's orders".

The result of this is that Plaintiff had a full and fair opportunity to present his position at the May 6, 1974 hearing and the Judge simply decided against him. That should be conclusive because there is absolutely no showing of fraud, extrinsic or otherwise, which affected Plaintiff's ability to present his case.

Plaintiff also argues that McEwen's failure to disclose his "status" with the Chamber of Commerce constituted a "fraud upon the court". Although a definition of "fraud upon the court" is difficult, it is without question that the conduct must be of a most serious nature and such that to allow it to stand would "defile" the Court itself. 7 Moore Federal Practice, 2nd ed., 1971, §60.23, p. 153. To constitute fraud upon the Court, the conduct is generally perpetrated by an officer of the Court or the judge himself in such a manner that the aggrieved party was unable to properly present his issues before the Court. Martin Theatre Corporation v. Shine Chain Theatres, Inc. (2d Cir. 1960), 278 F.2d 798.

However, as set forth hereinabove, McEwen's position with the Chamber of Commerce or his failure to disclose that position in no way prevented Plaintiff from properly presenting his case at the order to show cause and cannot constitute under any imaginable theory a fraud upon the Court.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: January 7, 1982.

Respectfully submitted,
MYERS, WIDDERS & GIBSON
By: Monte L. Widders
260 Maple Court, Suite 231
Ventura, California 93003
805:644-7188

Attorneys for Respondents,
Better Business Bureau of
the Tri-Counties, Inc.,
Hartford Accident &
Indemnity Co. and
Monte L. Widders

## STATEMENT PURSUANT TO RULE 28.2, RULES OF THE SUPREME COURT OF THE UNITED STATES

I, MONTE L. WIDDERS, being first duly sworn, depose and say:

1. I am an attorney at law and a member of the Bar of the Supreme Court of the United States.

2. I received a copy of Petitioner's "Petition for Writ of Certiorari to the United States Court of Appeals" on December 8, 1981.

3. Pursuant to Rule 22.1, Rules of the Supreme Court, Respondents, Better Business Bureau of the Tri-Counties, Inc., Hartford Accident & Indemnity Co. and Monte L. Widders, had until January 7, 1982 in which to respond to said Petition.

4. I have personal knowledge that on January 7, 1982 40 copies of the foregoing Response were deposited in the United States Post Office at Ventura, California with first class postage prepaid addressed to the Clerk of this Court as follows:

Office of the Clerk
Supreme Court of the United States
Washington, D. C. 20543

Monte L. Widders

SUBSCRIBED AND SWORN
to before me this 7th
day of January, 1982.

Mary E. Moros
Notary Public in and
for the County of
Ventura, State of
California

## CERTIFICATE OF SERVICE BY MAIL

I, MARY E. MOROS, declare that I am a citizen of the United States and a resident employed in Ventura County, California; that my business address is 260 Maple Court, Suite 231, Ventura, California 93003; and that I am over the age of eighteen (18) years and not a party to the above-entitled action.

I am employed in the law office of Monte L. Widders who is duly qualified to practice before the Supreme Court of the United States and under whose direction I make this service.

On January 7, 1982, I served the within Response of Respondents, Better Business Bureau of the Tri-Counties, Inc., Hartford Accident & Indemnity Co. and Monte L. Widders, to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by placing three (3) true copies thereof in the United States mail at Ventura, California addressed as indicated on the attached list. The copies mailed were accompanied by an unsigned copy of this document.

Service of said Response was made in compliance with Rule 28.3, Rules of the Supreme Court of the United States.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on January 7, 1982 at Ventura, California.

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Hon. Francis C. Whelan
U.S. District Judge
1100 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012

Opposition

2

Office - Supreme Court, U.S.
FILED
JAN 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1070

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MICHAEL R. WOOD, individually and dba

NATIONAL PHOTO SERVICES,

Petitioner,

vs.

WILLARD W. McEWEN, JR., et al.,

Respondents.

---

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

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HOLLISTER & BRACE, INC.,
GEORGE A. REMPE, III, and
J. JAMES HOLLISTER, III.

## QUESTIONS PRESENTED

(As Presented By Plaintiff)

1. Must a special master disqualify himself where he is an active officer and director of a corporation which continuously employs two of the parties to the action as its exclusive advertising agents and the litigation before him arises out of an advertising campaign those parties undertook for his corporation?

2. Does a party have a remedy under Rule 60(b)(6) of the Federal Rules of Civil Procedure and/or by an independent action in equity to set aside a judgment based in large measure on the affidavit and report of a special master who should have disqualified himself?

## LIST OF PARTIES

Plaintiff:

MICHAEL R. WOOD, individually and dba NATIONAL PHOTO SERVICES

Defendants:

WILLARD W. McEWEN, JR.

HUGH J. HAFERKAMP

MONTE L. WIDDERS

CHACE COMPANY ADVERTISING, INC., a corporation

THOMAS CHACE, an individual

BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., aka BETTER BUSINESS BUREAU OF THE TRI-COUNTIES, INC., a corporation

SANTA BARBARA CHAMBER OF COMMERCE, INC., a corporation

ALL YEAR ASSOCIATION, a subsidiary corporation of the Santa Barbara Chamber of Commerce

## LIST OF PARTIES - CONTINUED

AETNA LIFE & CASUALTY, INC., a corporation;

HARTFORD LIFE INSURANCE COMPANY, a corporation, aka HARTFORD INSURANCE GROUP

CAVALLETTO, WEBSTER, MULLEN & McCAUGHEY, a partnership

HOLLISTER, BRACE & ANGLE, a partnership

HOLLISTER & BRACE, INC., a corporation formerly Hollister, Brace & Angle, a partnership

GEORGE A. REMPE, III

J. JAMES HOLLISTER, III

JAMES W. BROWN

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No. 81-1070

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MICHAEL R. WOOD, individually and dba NATIONAL PHOTO SERVICES,

Petitioner,

vs.

WILLARD W. McEWEN, JR., et al.,

Respondents.

---

## SUPPLEMENTAL STATEMENT OF THE CASE

The "Statement of the Case" section of the petition contains numerous errors and omissions intended basically to elicit the sympathy of this court. It is obviously impractical to discuss all aspects of the previous action and the present action. However, there are certain facts that should be mentioned to supplement petitioner's statements or to correct them so that the matter can be placed in proper perspective.

A. The Prior Action

For the present purposes, it is important to note that the First Cause of Action in petitioner's prior action was the only aspect of the case that had any conceivable relationship to the Santa Barbara Chamber of Commerce and that relationship was extremely attenuated. The principal and almost exclusive thrust of the first action related to the alleged antitrust violations of the defendants. The asserted copyright infringement alleged centered upon one photograph which plaintiff claimed had been improperly used by Chace. That one photograph was indistinguishable from the photographs properly used (in fact, it was one of the 18 photographs) and little emphasis was placed on the copyright aspect of the action.

Furthermore, Chace Company Advertising, Inc. was employed by the All Year Association to carry out the functions for which the All Year Association had been organized. Chace did not work for the Santa Barbara Chamber of Commerce at any time. In fact, the All Year Association is a corporation independent of the Chamber of Commerce and Mr. McEwen was never involved in functions of the All Year Association after it was established.

The Chamber of Commerce is a nonprofit civic organization organized to promote activities generally beneficial to the business community. It is not a stock corporation. The All Year Association is a nonprofit corporation which was organized for the purpose of acting as a sort of trustee of tax revenues paid to it by local government for the purpose of promoting tourism in the general Santa Barbara area. Since both corporations are nonprofit and do not issue stock, petitioner's characterization of one as the "subsidiary" of the other is obviously inaccurate.

Although the complaint in the first action does mention in passing that the advertising campaign had been conducted for the Chamber of Commerce, it was rapidly established in discovery that Chace Company Advertising, Inc. had been acting for the All Year Association rather than the Chamber of Commerce. Consequently, Mr. McEwen's extracurricular activities with the Chamber of Commerce were never of any real consequence in the first action because the Chamber was not really involved in the action and petitioner never made any claim against the Chamber.

The petition asserts in a footnote that plaintiff's appeal from the first action was dismissed under "shocking" circumstances. The fact is that there was nothing shocking about it and plaintiff is well aware of the lack of any surprise. Although it is true that the information given to attorney Haferkamp by the clerk to the effect that plaintiff had not paid his docket fee, the motion to dismiss the appeal did bring to the attention of the court the fact that plaintiff had not filed his opening brief. Plaintiff further had secured no extension of time to file the brief. When the appeal was dismissed, the brief was several weeks overdue and the plaintiff made no effort to explain nor did he request relief from default. The appeal was properly dismissed for lack of prosecution.

### B. The Present Action

In 1977, utilizing a fairly common

pro se technique, plaintiff filed the action below as an attack upon the United States Magistrate who had acted in the earlier proceeding. Plaintiff had somewhere come across the device of the "independent action in equity" to set aside judgments. However, it was evident that he had nothing but conclusory allegations with no facts upon which to plead as the district judge patiently dealt with four efforts to state a claim upon which relief could be granted. Furthermore, it was clear that the conclusory allegations plaintiff did make were focused upon the contents of the affidavit and interim report of the Special Master, which, giving plaintiff's allegations the full benefit, stated at most intrinsic fraud. The district court properly dismissed the action and the court of appeals affirmed.

These respondents completely

repudiate the asserted stipulation mentioned by petitioner confusing the functions of the Chamber of Commerce and the All Year Association. At the time that that was done, a new attorney had just entered the case and found that he was in default for failing to file a timely appearance. Without consultation with any of the other defendants, he apparently relied upon Mr. Wood's assertions as part of gaining relief from default. Several of the statements in that "stipulation" are demonstrably incorrect and it should never have been accepted by the unfortunate attorney. Nevertheless, it is not part of the complaints which were under scrutiny in the district court and it is not binding upon any other defendant in the action. It is of interest to note that during the course of the proceedings below, plaintiff developed the same basic claim against the district judge to whom the case was assigned. He contended that there was a "close association" between Mr. McEwen and all of the district judges of the Central District of California, thereby disqualifying all judges of that district. Plaintiff's motion to transfer the case to the District of Nevada was properly denied. Plaintiff subsequently filed another action in Las Vegas, Nevada, asserting as part of that action the claims involved in the Los Angeles action.

## PLAINTIFF'S CONCLUSIONARY ALLEGATIONS DO NOT STATE A CLAIM AS AN INDEPENDENT ACTION IN EQUITY

### A. The Petition's Disqualification Claim Is Without Merit Under The Correct Law

Although petitioner has focused upon a narrow point in this petition, it is of significance to have in mind that the petitioner's complaint in the district court was an independent action in equity to set aside a judgment entered approximately three years earlier. There are several requirements that are necessary for such an action in addition to the point urged. Banker's Mortgage Co. v. United States, 423 F.2d 73 (5th Cir. 1970). As an example, one of the elements is the absence of fault or negligence on the part of the losing party. Since the court's records in the first cause of action were available under judicial notice, it is clear that plaintiff's fault in the first action would, in itself, justify the conclusion that no claim was stated for relief from the earlier judgment.

Nevertheless, turning to the specific contentions of plaintiff, it is evident upon close examination of the petition that plaintiff is using a "slight of hand" technique to urge a retroactive application of the provisions of 28 U.S.C. §455 as amended December 5, 1974. However, the amended provisions are not retroactive and do not apply to the case at bar. That rule is established by one of the cases cited by plaintiff in his petition: In Re Virginia Elec. & Power Co., 539 F.2d 357, 361-362, 366, 369 (4th Cir. 1976). In fact, in that case, the 4th Circuit held specifically that a district judge who had applied the amended provisions of §455 in a case that had arisen prior to its effective date committed error in that respect.

The principal cases cited by plaintiff are Lister v. Commissioner's Court, Navarro County, 566 F.2d 490 (5th Cir. 1978) and Mixon v. United States, 620 F.2d 486 (5th Cir. 1980). Both of those cases are decisions under the amended §455 and both of them are based upon specific statutory provisions set forth in that Code section. The proceedings in the original action took place under the prior §455. That section utilized a different standard than the amended provisions and placed the decision basically in the judgment of the judicial officer in the normal case. United States v. Ritter, 540 F.2d 459, 462 (10th Cir. 1976).

## B. Petitioner Makes No Factual Allegations As To Any Interest Of McEwen In The Matter

In the original action, neither the Chamber of Commerce nor the All Year Association was a party to the action. Neither of them was involved at the case at all. There was no factual allegation establishing any interest in the matter whatsoever on the part of Mr. McEwen and, as the only United States Magistrate in the area, his special knowledge of federal law and procedures particularly fitted him for the function of Special Master in that matter.

The case below was properly decided and the opinion of the Court of Appeals follows existing law. This petition should be denied.

Dated: January 7, 1982

Respectfully submitted,

HUGH J. HAFERKAMP

WILLIAM A. BRACE

## CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 1982, three copies of the Response To Petition For Writ of Certiorari were mailed, postage prepaid, to the parties listed below. I further certify that all parties required to be served have been served. Service was made pursuant to Rule 33.3(c).

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STATE OF CALIFORNIA } SS.
COUNTY OF SANTA BARBARA

On Jan. 7, 1982 before me, the undersigned, a Notary Public in and for said State, personally appeared JOHN W. GRANT, known to me to be the person whose name subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

Signature Carol Drury

OFFICIAL SEAL
CAROL DRURY
NOTARY PUBLIC - CALIFORNIA
SANTA BARBARA COUNTY
My Comm. Expires Nov. 19, 1985

# Petitioner's
# Reply Brief

No. 81-1070

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MICHAEL R. WOOD, individually and dba

NATIONAL PHOTO SERVICES,

Petitioner,

-vs-

WILLARD W. McEWEN, JR., et al.,

Respondents.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# PETITIONER'S REPLY MEMORANDUM

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MICHAEL R. WOOD
1266 Coast Village Road
Santa Barbara, CA 93108
(805) 969-5935

Petitioner Pro Se

February 14, 1982

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# PETITIONER'S REPLY MEMORANDUM

## INTRODUCTION

1. Respondents, in their effort to assure this Court there is nothing amiss in this case, do not fairly acknowledge the allegations of the first amended complaint in this action. Because of its significance to the issues, that complaint and the exhibits thereto are attached as

Appendix E 1/, and the Request for Admission of Facts and subsequent court-approved Stipulation re Discovery (admitting the facts as requested) are attached as Appendix F.

2. In an apparently desperate attempt to alter the record, the response filed by Hugh J. Haferkamp and William A. Brace on behalf of various defendants seeks (at pages 6-7) to repudiate, for the first time, the Stipulation re Discovery, on the basis of asserted facts which are not in the record and which are in conflict with the deposition testimony of Mr. Haferkamp's own client Thomas Chace (attached as Exhibit N to the first amended complaint). No party, not even

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1/Appendices A through D are attached to the petition for certiorari.

the Santa Barbara Chamber of Commerce itself, ever sought to set that stipulation aside as inaccurate, either in the trial court or in the Court of Appeals. It has long been settled that the parties' stipulation of a fact, whether evidentiary or ultimate, establishes that fact and is binding upon the trial and appellate courts. Hackfeld & Co. v. United States, 197 U.S. 442, 443-444, 446-447 (reversing judgment of Ninth Circuit which had disregarded stipulation of ultimate fact).

The response filed by Myers, Widders & Gibson, while inaccurate in other respects, does admit that Mr. McEwen was an officer and director of the Santa Barbara Chamber of Commerce at the time he was appointed special master (page 15), and that it was the defendants who suggested he be so appointed (page 5). If the Court has any doubt as to Mr. McEwen's keen personal interest in and support for the Chamber's advertising program, plaintiff urges the Court to read Exhibit G to the first amended complaint in this action. That exhibit, a newspaper article concerning a speech given by Mr. McEwen, demonstrates that (1) he was instrumental in drafting the 1962 "bed tax" ordinance which provided the financing for the Chamber's advertising program, (2) the program is administered by the All Year Association, a "subsidiary" of the Chamber, and (3) he considered "continuity" of the advertising campaign to be "vital" to Santa Barbara.

The complaint in the prior action (Exhibit A to the first amended complaint), in which Mr. McEwen was appointed to act as a supposedly objective and impartial special master, named as the first two defendants the Chamber's exclusive advertising agent (Chace Company

Advertising, Inc.) and its president (Thomas Chace) and alleged on its second page (par. III):

> "On or about April 28, 1969, plaintiff submitted 400 proofs of said photographs to defendants CHACE CO. ADVERTISING, INC. and THOMAS CHACE, hereinafter collectively called 'Chace', having its principal place of business at Santa Barbara, California, in this Central District, for selection from the 400 proofs of 18 photographs for use in a certain advertising campaign for the Santa Barbara Chamber of Commerce, ..."

The complaint alleged that Chace infringed plaintiff's copyright by utilizing others of the 400 photographs in subsequent advertising campaigns for the Chamber (pars. VIII - X, and Exhibits 1 and 2 thereto). All these allegations were incorporated by reference in the remaining causes of action of the complaint (pars.

XIII, XXIX, XXXI).

3. Both responses to the petition falsely assert that the copyright infringement cause of action was based on only one photograph and that said cause of action was of little importance in comparison to the antitrust cause of action (Haferkamp/Brace response, pages 2-3; Myers, Widders & Gibson response, page 4). In fact, the copyright cause of action was the first cause of action set forth in the complaint, and it alleged not only that plaintiff had discovered one specific unauthorized use by defendants of one of his negatives, but that "plaintiff has information and belief that other reproductions have been made from other unselected copyrighted negatives" (par.VIII of complaint).

It was Mr. McEwen, through his "supervision" of discovery, who wholly prevented plaintiff from uncovering the hundreds of additional infringements by defendants which had occurred by that time. (The additional infringements were discovered in the course of plaintiff's Nevada litigation against other defendants.) Although the district judge may not have contemplated, when he appointed Mr. McEwen, that Mr. McEwen's participation would affect the disposition of plaintiff's case (see Myers, Widders & Gibson response, page 17), in fact Mr. McEwen's conduct in his role became critical to the litigation and his rulings and affidavit influenced the district judge in his decision to dismiss plaintiff's complaint. Thus, contrary to the suggestion at page 27 of the Myers, Widders & Gibson response, plaintiff was indeed "thwarted" in his ability to present his case because his adversary was not merely another party to the litigation, but a supposedly impartial judicial officer.

## ARGUMENT

The Haferkamp/Brace response to the petition is wholly disingenuous. Disregarding entirely the decisions of this Court upon which plaintiff principally relies (e.g., In re Gilbert, 276 U.S. 6; Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145), said response falsely asserts (page 10) that two Court of Appeals decisions are plaintiff's "principal cases", and then attempts briefly to distinguish them. Further, the assertion in said response (page 11) that plaintiff has made no factual allegation as to any interest of Mr. McEwen in the subject matter of the prior action is false, as reference to the first amended complaint and its exhibits will demonstrate.

Moreover, the repeated use of the term "interest", as though a "substantial interest" is the only basis under 28 U.S.C. Sec. 455 for disqualification of a judicial officer, ignores the other bases set forth in that section in the disjunctive (and quoted at page three of the petition), including the officer being "so...connected with any party or his attorney as to render it improper" for him to participate. The Myers, Widders & Gibson response contains the same flaw, for it repeatedly asserts (pages 17-19, 20-21) that the absence of a "financial" or "pecuniary" interest of Mr. McEwen in the subject matter of the action is alone sufficient to justify his failure to disqualify himself or even disclose his activities on behalf of the Chamber. An officer of the court is prohibited not only from using his position for personal financial profit, but from using it "to further the interests of themselves or any associates." Crites, Inc. v. Prudential Insurance Co., 322 U.S. 408, 414.

It ignores reality to suggest that Mr. McEwen as an officer and director of the Chamber and the principal spokesman for its advertising program, did not have a stake in defeating a law suit which, by entry of an injunction and an award of substantial damages against the Chamber's exclusive advertising agents (and perhaps the Chamber itself), might seriously disrupt that program. After all, "the prime function of a chamber of commerce is to drum up business for its members" through advertising, Hutter Northern Trust v. Door County Chamber of Commerce, 403 F.2d 481, 485 (7th Cir. 1968), and Mr. McEwen's personal prestige and power within the Chamber, and his practice of law in the Santa Barbara community, could have been rather adversely affected by disruption of an advertising program he himself called "vital" to the area. Contrary to the suggestion in the Myers, Widders & Gibson response (pages 18,21,23) and in the Court of Appeals' opinion, this is not a case in which "mere membership" in an organization is claimed as the basis for disqualification.

Moreover, this a not the case in which the need arose to appoint a special master with expertise in some particular commercial subject matter. In such cases, the standards of impartiality are sometimes lowered because of the unavailability of anyone with sufficient expertise who meets the strict standards of the statutes and canons of judicial ethics. However, in such cases the interest or possible bias of the proposed master is generally known or at least is disclosed to the district court in advance of appointment. In plaintiff's action, any competent, experienced federal court practitioner could have been appointed to supervise discovery. There was no urgent need to appoint Mr. McEwen; from the district court's standpoint it was merely expedient to do so. But neither Mr. McEwen nor his colleagues who urged his appointment disclosed his serious conflict of interest to the court.

In Sanko S.S. Co., Ltd. v. Cook Industries, Inc., 495 F.2d 1260 (2d Cir. 1973), Sanko sought to set aside an arbitration award in favor of Cook, contending that one of the arbitrators failed to disclose, inter alia, that his own company had been represented by Cook's attorney for some time. The district judge, without holding an evidentiary hearing, discounted this undisclosed interest and confirmed the arbitration award. The Court of Appeals reversed, holding (at 1263) that Sanko had pointed to a "substantial and continuing relationship" and that an evidentiary hearing was required so that "the full extent and nature of the relationships at issue may be ascertained" and "the district court will be in a better position to follow the dictates of Commonwealth Coatings..."

In the present case, the district court has dismissed plaintiff's pleading for failure to state a cause of action, thus depriving him of an evidentiary hearing, and the Court of Appeals has affirmed that dismissal. Plaintiff appears in propria persona (but not in forma pauperis); he has alleged, perhaps inartfully, at the very least a serious violation of ethics by a judicial officer; and he is entitled to an opportunity to offer proof in support of his claim for equitable relief from the prior judgment. Haines v. Kerner, 404 U.S. 519, followed in Boag v. MacDougall, 454 U.S. ___ No. 80-6845 (Decided January 11, 1982). It is inconceivable that there might exist no remedy for the wrong which plaintiff has alleged .

## SUMMARY AND CONCLUSION

Something is rotten in the City of Santa Barbara. If this Court averts its eyes from the shocking situation disclosed by plaintiff's first amended complaint and exhibits, a situation which reminds one more of Kafka than of common law, it will bring disgrace to a judicial system whose goal is the impartial administration of justice for all.

For all the foregoing reasons, as well as those set forth in the petition itself, a writ of certiorari should issue.

February 14, 1982

Respectfully submitted,

MICHAEL R. WOOD
1266 Coast Village Road
Santa Barbara, CA 93108
(805) 969-5935

Petitioner Pro Se

# APPENDICES

APPENDIX

E First Amended Complaint In The Prior Action........... A1-A39

F (1) Request for Admission of Facts.................... A40-A45

(2) Stipulation Between Michael Wood, Plaintiff and Santa Barbara Chamber of Commerce, Defendant; Signed By Trial Judge, Francis C. Whelan......... A46-A48

# APPENDIX E

FILED
AUGUST 29, 1977
CLERK U.S. DISTRICT COURT
Central District of California

MICHAEL R. WOOD
1266 Coast Village Road
Santa Barbara, California 93108
[805] 969-0465

Attorney for Plaintiff
In Pro Per

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, individually and dba
NATIONAL PHOTO SERICES

Plaintiff,

vs.

WILLARD W. McEWEN, JR.; HUGH J. HAFERKAMP; MONTE L. WIDDERS; CHACE COMPANY ADVERTISING, INC., a corporation; THOMAS CHACE, an individual; BETTER BUSINESS BUREAU OF SANTA BARBARA, INC. aka BETTER BUSINESS BUREAU OF THE TRI-COUNTIES INC., a corporation; SANTA BARBARA CHAMBER OF COMMERCE, INC., a corporation, ALL YEAR ASSOCIATION, a subsidiary corporation of the Santa Barbara Chamber of Commerce; AETNA LIFE & CASUALTY, INC., a corporation; HARTFORD LIFE INSURANCE

COMPANY, a corporation, aka HARFORD
INSURANCE GROUP; CAVALLETTO, WEBSTER,
MULLEN & McCAUGHEY, a partnership;
HOLLISTER, BRACE & ANGLE, a partnership;
HOLLISTER & BRACE, INC., a corporation
formerly Hollister, Brace & Angle, a
partnership; GEORGE A. REMPE, III;
J. JAMES HOLLISTER, III; JAMES W. BROWN;

Defendants.

No. 77-1762-FW

FIRST AMEMDED COMPLAINT IN ACTION TO
VACATE JUDGMENT PROCURED BY FRAUD UPON THE
COURT FOR FRAUD F.R. Civ. P. Rule 60 (b)
(3) (6), JURY TRIAL DEMANDED

---

Plaintiff complains of defendants and each of them and for cause of action alleges as follows:

I

This is a complaint to vacate a judgment procured by Fraud upon the Court for fraud. Original jurisdiction arose under 28 USC 1338 (first cause of action); sections 4 & 16 of the Clayton Act, 38 Stat. sections 731 and 737, 15 USC sections 15 and 26; 15 USC sections 1 and

2 (second, third and forth cause of action), for the purpose of this complaint, this court has jurisdiction under F. R. Civ. P. 60 (b) (3), (6), 28 USC . . . "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, . . . . or to set aside a judgment for fraud upon the court."

## II

On the 10th day of June, 1974, in an action in the United States District Court for the Central District of California, wherein Michael R. Wood, dba National Photo Services was plaintiff, and Chace Company Advertising, Inc., a corporation, Thomas Chace, and individual, and Better Business Bureau of Santa Barbara, Inc., aka Better Business Bureau of the Tri-Counties, Inc., a corporaton, were defendants, a final judgment of dismissal was fraudulently procured by the defendants form the court, which entered said judgment against plaintiff.

## III

Defendants Chace Company Advertising and Thomas Chace were the original defendants herein, and were at all times involved in the complaint represented by attorneys; Cavalletto, Webster, Mullen and McCaughey, a law firm, and Hugh J. Haferkamp and James W. Brown of said firm, and also Hollister, Brace and Angle, another law firm all as attorneys of record, and all of whom are now defendants in this action, and all of whom, with the exceptions of Hollister, Brace and Angle, were retained by Aetna Life Casualty, Inc. who is also named as defendant herein.

## IV

Since April, 1954, Cavalletto, Webster, Mullen and McCaughey, a law firm appeared as attorney of record for Thomas Chace and Chace Company Advertising, Inc., were members of the Santa Barbara Chamber of Commerce. On or about March 27, 1974, this firm requested, on behalf of all defendants, the appointment of Willard W. McEwen, as Special Master, then and there full well knowing that he was intimately involved with defendants, Santa Barbara Chamber of Commerce, in his capacity as an officer since 1965 and eventually becoming President of said Santa Barbara Chamber of Commerce in 1976, and all of which is in direct conflict with his becoming court-appointed Special Master to preside over discovery proceedings in the original action and in which he had a personal interest.

## V

Thomas Chace and Chace Company Advertising, Inc., was the advertising agent for said Santa Barbara Chamber of Commerce and its All Year Association, which is a subsidiary corporation of the Santa Barbara Chamber of Commerce, Inc.

## VI

Defendant Hollister, Brace and Angle, a partnership, now doing business as Hollister & Brace, Inc., and defendant J. James Hollister, attorney, and defendant George A. Rempe, III, attorney employed by said law firm, likewise represented Thomas Chace and Chace Company Advertising, Inc., as attorneys of record and said firm has been a member of Santa Barbara Chamber of Commerce since October, 1966, and had knowledge of Willard W. McEwen's intimate involvment [sic] with the Santa Barbara Chamber of Commerce in his capacity as an officer, and all which is in direct conflict with his becoming court-appointed Special Master to preside over discovery proceedings.

## VII

Defendant Better Business Bureau, an original defendant herein, was represented by defendant Monte L. Widders, being the attorney of record, who was retained by Hartford Life Insurance Company, aka Hartford Insurance Group, and all of whom are now defendants in this action. Said defendant Monte Widders, also requested the appointment of defendant Willard W. McEwen, as Special Master, then and there knowing that he was intimately involved with the Santa Barbara Chamber of Commerce as hereinabove alleged in paragraph IV.

VIII

Willard W. McEwen, defendant herein, was at all times relevant, an officer of defendant Santa Barbara Chamber of Commerce, and active in said Chamber's affairs since the year 1965, and President of said Chamber during the year 1976; defendant All Year Association, a subsidiary corporation of the said Chamber of Commerce, employed defendant Chace Company Advertising, Inc., and defendant Thomas Chace, to produce and place advertising in the media as an agent.

IX

That the original complaint, No.

72-1179-RJK, hereto incorporated and attached as "Exhibit A", paragraph III, page 2, sets forth in relevant part:

"On or about April 28, 1969, plaintiff submittted 400 proofs of said photographs to defendants Chace Company Advertising, Inc., and Thomas Chace, hereinafter collectively called "Chace", having its principal place of business at Santa Barbara, California, in this Central District, for selection from the 400 proofs of 18 photographs for use in a certain advertising campaign for the Santa Barbara Chamber of Commerce, consisting of four photographic advertisements, retaining however, copyrights therein and all rights to publish and reproduce said photographs for sale."

X

That prior to April, 1974, the defendants and each of them including defendant Willard W. McEwen willfully and corruptly entered into a conspiracy to deceive and commit fraud upon the United States District Court and upon the plaintiff, and to obstruct justice in the following manner: All defendants hereinabove mentioned agreed and conspired to pretend, falsely represent and deceive the Honorable Rober J. Kelleher into believing that said defendants were making an honest and good faith application for said judge's appointment of a disinterested, unbiased and qualified individual to act in a fiduciary capacity as Special Master, and said defendants knew full well that such appointment of said defendant Willard McEwen who possessed a substantial conflict of interest by reason that he was intimately involved with defendants, precluded him from being legally qualified and able to serve the interests of justice and the Court as a disinterested and unbiased Special Master appointed by the Court.

## XI

That on March 27, 1974, all of the defendants in the original action specifically requested the court to appoint Willard W. McEwen, a United States Magistrate, as a Special Master to "supervise the discovery." See Exhibit "B", hereto incorporated and atttached as "Exhibit B", entitled "Conditional Notice of non-opposition to plaintiff's motion for reconsideration of order terminating discovery." All defendants hereinabove mentioned corruptly agreed and conspired to practice deceit and to deliberately and corruptly misrepresent before the Honorable Robert J. Kelleher that defendant Willard McEwen was a disinterested, unbiased and legally qualified individual to be appointed by said court as a Special Master when all defendants at all times knew that defendant Willard McEwen was, in fact, not a disinterested, unbiased and legally qualified individual to be appointed by the court as a Special Master; that all defendants then and there knew that defendant Willard McEwen possessed a substantial conflict of interest and that the appointment of defendant Willard McEwen with his subtantial interest in the success of defendants' interests would be contrary to the interests of justice and law and would result in irreparable damage to plaintiff. That said defendants in furtherance of said conspiracy to deceive and commit fraud upon the United States District Court did corruptly misrepresent before the Honorable Robert J. Kelleher that defendant Willard McEwen was eminently qualified to be appointed by said court as its Special Master, knowing full well that said representation was false.

## XII

Thereafter, on April 1, 1974, and as a direct and proximate result of defendant's said misrepresentation, deceit and fraud, the court in good faith adopted the defendant's specific request and did appoint said Willard McEwen, and all against objections by the plaintiff. On said date, the court ordered that "The Honorable Willard W. McEwen, United States Magistrate, will be appointed Special Master with full powers." The plaintiff voiced objection in open court:

MR. WOOD: Your Honor, is it possible, can someone else, in the U.S. Attorney's Office, be appointed as a Special Master?

THE COURT: No. Why do you want someone there?

MR. WOOD: I prefer somebody out of the Santa Barbara area. I don't really care who, just somebody out of the Santa Barbara area.

MR. WOOD: I just feel that there would be a better look at things if the person was not in Santa Barbara, sir.

THE COURT: Mr. McEwen will be the Special Master.

(See Exhibit "C", hereto incorporated and attached as "Exhibit C", entitled Reporter's Transcript of Proceedings on April 1, 1974; Edward Newlander, official reporter.)

## XIII

Plaintiff did not then and there know of defendant Willard McEwen's conflict of interest. His objection was made solely on the grounds that prudence demanded that a Special Master be appointed who does not reside in Santa Barbara area, and not likely to be affected by its peculiar interests, or its politics, or its Better Business Bureau.

## XIV

That as a result of said corruptly conspired deceit and false representation in deceiving said court, the defendants succeeded in procuring the appointment of defendant Willard McEwen as Special Master, and said appointment with its built-in conflict of interest did result in irreparable damage to plaintiff.

## XV

That as further result of defendants having succeeded in deceitfully and corruptly procuring the appointment of defendant Willard McEwen as Special Master, said defendant Willard McEwen, in furtherance of said conspiracy to obstruct justice, did, with his previously existing bias and prejudice against plaintiff, corruptly and deceitfully pretend to act under the color of law as a court-appointed Special Master and to obstruct justice in violation of the law. This subsequently resulted in injury to plaintiff in the following manner:

(A). By presiding under color of court-appointed Special Master over a discovery proceedings, a deposition taken by defendants of plaintiff for a period of time covering five days totaling more than 30 hours, was done for the purpose of harassing plaintiff and as a pretext for preparing an "affidavit and interim report of Special Master" which was false and contrived to place the plaintiff in disfavor with Honorable Robert J. Kelleher. Although defendant Willard McEwen was "appointed" to supervise the taking of plaintiff's deposition, he was present no more than a total of four (4) hours out of the thirty (30) hours during which defendants Hugh Haferkamp and Monte Widders took plaintiff's deposition. Also during said deposition, defendants Hugh Haferkamp and Monte Widders called defendant Willard MeEwen at his office for the purpose of obtaining "rulings" against plaintiff, and that defendant Willard McEwen being remote and personally not present at said deposition nevertheless made "rulings" over the telephone to defendants Hugh Haferkamp and Monte Widders in their favor and against plaintiff. Plaintiff was not allowed by defendants to talk on the telephone to Special Master Willard McEwen and also was not given any opportunity to be heard regarding the subject matter of the "rulings" made by Special Master Willard McEwen to the defendants over the telephone.

(B). Thereafter, defendant Special Master Willard McEwen, in furtherance of said conspiracy to obstruct justice, knowingly and corruptly executed a false affidavit.

(C). Said affidavit is false in the following respects:

(1). Statement in affidavit of defendant Willard McEwen that "plaintiff was duly notified" of the place for taking plaintiff's deposition is false. Plaintiff was never notified.

(2). As stated in affidavit of defendant Willard McEwen that plaintiff allegedly "violated that order" to produce tape recordings no later than 9:30 a.m. on April 17, 1974 for copying is false. Plaintiff complied with said order, but defendants were not prepared and failed to copy the tapes until approximately 2:00 p.m. the following afternoon.

(3). Statement in affidavit of defendant Willard McEwen that plaintiff "agreed on April 1, 1974, to produce all documents he had in his possession or control during his deposition upon presentation of a list of requested documents by defendant counsel," is false. Plaintiff did not so agree.

(4). Statement in affidavit of defendant Willard McEwen that he made an order that plaintiff make available for inspection all records in his possession on April 26, 1974 at 9:30 a.m. at plaintiff's apartment, 1936 (C) North Jameson, Santa Barbara, California, "pursuant to a stipulation of all parties", is false. Plaintiff never so stipulated. Nevertheless, defendants Hugh Haferkamp and Monte Widders appeared at plaintiff's said apartment at 9:30 a.m., April 26, 1974, notwithstanding that said defendants had been served with ex parte application for a protective order under Federal Rules of Civil Procedure 26 (c).

(5). Statement in affidavit of defendant Special Master Willard McEwen that plaintiff was "uncooperative in the discovery efforts" is false. Plaintiff not only cooperated in good faith, but when taking defendant Chaces's deposition, defendants Hugh Haferkamp and Monte Widders objected to every question asked by plaintiff, and in furtherance of their conspiracy to osbstruct justice, defendant Special Master Willard McEwen sustained every objection, thus effectively destroying plaintiff's right to discovery.

In furtherance of said conspiracy, defendant Special Master McEwen solicited a motion to cease taking the depositon of Tom Chace, and so granted it. This motion was made to stifle Tom Chace from divulging incriminating facts that would undoubtedly be forthcoming in his deposition, all a part of conspiracy to obstruct plaintiff's right to discovery.

### XVI

On April 28, 1974, defendant Monte Widders hand delivered to the plaintiff two documents: [1] Notice of ex parte application for an order dismissing plaintiff's action based in part on he purported orders of said Willard McEwen, as Special Master, hereto incorporated and attached as "Exhibit D", and [2] copy of defendant Willard McEwen's affidavit and interim report of Special Master (Willard

McEwen), which is hereto incorporated and attached as "Exhibit E". Said ex parte application based on defendant Special Master Willard McEwen's affidavit and said affidavit itself are all the result of a conspiracy by all defendants named herein to obstruct justice and to deprive plaintiff of his property without due process of law.

### XVII

Thereafter the court adopted the above documents enumerated in paragraph XVI (16) as the basis for an order to show cause why plaintiff's action should not be dismissed on May 6, 1974.

### XVIII

Judgment of dismissal and memorandum

of decision were entered on June 10, 1974, hereto incorporated and attached as "Exhibit "K" and "L", all of which were based on the documents described in paragraph XVI (16) Exhibits "D" and "E".

XIX

It was not until March 20, 1977, that plaintiff Michael R. Wood discovered an article in the Santa Barbara News Press dated February 5, 1976, which reported that defendant Willard McEwen was the new president of the Santa Barbara Chamber of Commerce, hereto incorporated and attached as "Exhibit F".

XX

Thereafter plaintiff researched the past life of said defendant Willard McEwen and discovered in the June 20, 1975 daily edition of the Santa Barbara News Press, an article entitled "Chamber head assails plan to halt advertising program", wherein it is stated that said defendant William McEwen himself was instrumental in drafting the 1962 Bed-Tax ordinance which was designed to finance tourist promotions administered by the defendant All Year Association, a Chamber of Commerce non-profit subsidiary, hereto incorporated and attached as "Exhibit G".

## XXI

An article discovered in the Santa Barbara News Press in 1977, describes said defendant Willard McEwen as an officer of the defendant Santa Barbara Chamber of Commerce in the year 1973, hereto incorporated and attached as "Exhibit H".

## XXII

Another article discovered in the Santa Barbara News Press in 1977, states that said defendant Willard McEwen has been active in Santa Barbara Chamber of Commerce affairs since the year 1965, hereto incorporated and attached as "Exhibit I".

## XXIII

On June 19, 1973, said defendant McEwen was sworn in to the part-time position of United States Magistrate at Santa Barbara where he continued his private law practice, see article hereto incorporated and attached as "Exhibit J".

## XXIV

According to the deposition of Stanley Lowry, dated February 14, 1974, hereto incorporated and attached as "Exhibit M", Stanley Lowry, who was the executive vice-president and corporate secretary of the Santa Barbara Chamber of Commerce since 1969, stated under oath in relevant part:

Q. Was Chace company Advertising acting as an agent for the All-Year Association in regard to the tourist program?

A. Well, I don't know what you mean by the word "agent."

Q. Acting on behalf.

A. They were our advertising agent of record.

Q. Were they acting on behalf of the All Year Association to place those four ads?

A. Yes [Tr. p. 14.]

* * * * * *

Witness Stanley Lowry defined the All Year Association as a subsidiary of the Chamber of Commerce. [Tr. p. 28.]

## XXV

Defendant Thomas C. Chace by deposition taken on June 26, 1973, [Tr. p. 18, lines 17-26], hereto incorporated and attached as "Exhibit N", stated under oath in relevant part:

Q. All Year Association of Santa Barbara?

A. The All Year Association is a client, and that client would have been one that I would have considered appropriate to receive the memo.

Q. Did they receive one?

A. I don't know that.

Q. All right. Santa Barbara Chamber of Commerce?

A. The two are synonymous; All Year Association is a subsidiary of the Chamber of Commerce. The same answer applies. They would be appropriate to receive a memo.

## XXVI

Non-disclosure of defendant Willard McEwen's dual status and the inherent conflict of interest on his part, coupled with the concerted activites of all defendants identified in the Rule 60 (b) (3), (6) complaint, to manipulate, frustrate and obstruct the discovery procedure by and through said defendant Willard McEwen with his cooperation and assistance, resulted in the dismissal of the plaintiff's action by the court.

## XXVII

Inasmuch as Thomas Chace and Chace Company Advertising Inc., were acting as agents on behalf of the Santa Barbara Chamber of Commerce, and the All Year Association subsidiary, neither the Chamber nor the All Year Association were actually named as defendants even though they were described in the body of the complaint. The fraudulent activities described above actually resulted in premature and illegal dismissal of complaint which was beneficial to all parties defendant and the two insurance carriers by reducing all liability beyond the point of dismissal.

## XXVIII

That without McEwen's conflict of interest and participation in the inconceivable plan and scheme designed to improperly influence the court in its decision, the judicial system could not perform in its usual manner by maintaining impartiality of adjudicating cases of this nature due to the fact that fraud has been brought upon the court.

XXIX

By reason of the fraudulent activities of all defendants, including malice and opression [sic], plaintiff is entitled to punitive damages in the sum of Two Million Dollars ($2,000,000.00) as to each and every defendant.

XXX

By reason of the foregoing, plaintiff requests a preliminary injunction restraining each and all defendants, and defendant's agents, servants, or employees from disposing of, removing, or destroying, any evidence relevant to this cause of action and as to case No. 72-1179-RJK; and that a Court Order requiring each and all defendants be required to deliver for the purpose of impoundage during the pendancy of this action all evidence, which has been requested, and those items which had not been previously requested, but at all times pertained to the subject matter of case No. 72-1179-RJK; and furtherance that each and all defendants be required to account for all evidence that has been disposed of or destroyed, that pertained to the subject matter of case no. 72-1179-RJK.

XXXI

In furtherance of the foregoing, the

plaintiff be allowed reasonable attorney's fees by this court, and all expenses and costs brought about by each and all defendants for fraud upon the court and the plaintiff in this action and in case NO. 72-1179-RJK.

WHEREFORE, Plaintiff prays:

1. Plaintiff demands judgment setting aside and vacating the said judgment.

2. Plaintiff further demands punitive damages in the sum of Two Million Dollars ($2,000,000.00) as to each and every defendant.

3. Plaintiff further demands preliminary injunction restraining each and every defendant from destroying of evidence relevant to this cause of action, and also as to the case No. 72-1179-RJK as hereinabove alleged in paragraph XXX (30).

4. Plaintiff further demands that

the defendants be required to deliver for impoundage during the pendancy of this action, all evidence as hereinabove alleged in paragraph XXX (30).

5. Plaintiff further demands that the defendants be required to account for all evidence destroyed as hereinabove alleged in paragraph XXX (30).

6. Plaintiff further demands that plaintiff be allowed reasonable attorney's fees by this court, and all expenses and costs brought about by each and all defendants for the fraud upon the court and the plaintiff as hereinabove alleged in paragraph XXXI (31), for case No. 72-1179-RJK.

7. Plaintiff further demands that each and every defendant be required to pay plaintiff all expenses incurred by plaintiff of this action and reasonable attorney's fees to be allowed to the plaintiff by the court for said action.

8. That the plaintiff be awarded costs and prays further for all needful orders and for full, general and equitable relief as this Court may deem just and proper for fraud upon the court and the plaintiff.

Dated: August 22, 1977

(signed) Michael R. Wood

Michael R. Wood, in pro per
Attorney for the Plaintiff

Demand for Jury Trial

Plaintiff Michael R. Wood Hereby demands trial by jury of all the issues in this action.

Dated: August 22, 1977

(signed) Michael R. Wood

Michael R. Wood, in pro per
Attorney for the Plaintiff

GEORGE N. NICOLETTI
Attorney at Law
512 East Wilson Avenue
Glendale, California 91203
240-8111

Attorney for Plaintiff

#72-1129-LS
Filed Dat MAY 25, 1972
1:30 PM

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, dba
NATIONAL PHOTO SERVICES,

Plaintiff,

vs.

CHACE COMPANY ADVERTISING,
INC., a corporation; THOMAS
CHACE, an individual; and
BETTER BUSINESS BUREAU OF
SANTA BARBARA, INC., a
corporation,

Defendants.

NO.

COMPLAINT FOR:

INFRINGEMENT OF COPYRIGHT
AND UNFAIR COMPETITION
(28 USCA 1338);

TREBLE DAMAGES AND INJUNCTIO
UNDER SHERMAN ANTITRUST
ACT -- GROUP BOYCOTT (28 USC
1337; 15 USCA 15 and 26);

TREBLE DAMAGES AND INJUNC-
TION FOR RESTRAINT OF TRADE;

DEFAMATION

Plaintiff complains of defendants and each of them and for causes of action alleges as follows:

FIRST CAUSE OF ACTION

I

This action arises under the copyright laws of the United States. Jurisdiction is conferred on this court by 28 USCA, Section 1338.

II

In 1969, plaintiff, who was at all times mentioned herein and now is a citizen of the United States of America, photographed and developed approximately 400 original photographs; and he is now and ever since has been the sole owner and proprietor of all right, title and interest in and to the copyright in said photographs, including the right to publish and reproduce

Best Copy Available

EXHIBIT A

said photographs in copies for sale, both at common law and under the copyright laws of the United States.

III

On or about April 28, 1969, plaintiff submitted 400 proofs of said photographs to defendants CHACE COMPANY ADVERTISING, INC. and THOMAS CHACE, hereinafter collectively called "Chace", having its principal place of business at Santa Barbara, California, in this Central District, for selection from the 400 proofs of 18 photographs for use in a certain advertising campaign for the Santa Barbara Chamber of Commerce, consisting of four advertisements, retaining, however, the copyrights therein and all rights to publish and reproduce said photographs for sale.

IV

After April 28, 1969, defendants Chace selected 18 photographs from the 400 submitted proofs for use in said ad campaign, causing plaintiff to make up 18 - 8"x10" reproductions from the selected proofs for said ad campaign which were later delivered to defendants Chace, at which time defendants Chace demanded the negatives not only of the 18 selected proofs but the balance of the 352 unselected proofs as well.

V

On or about March 13, 1970, plaintiff delivered to defendants Chace the negatives of all 400 proofs, under protest, retaining, however, the copyrights therein and all rights to publish and reproduce said photographs, defendants Chace having full knowledge of said copyright by the language of copyright stamped on each negative.

VI

On or about February 1970, plaintiff, complying in all respects with Title 17 USC and all other copyright laws of the United States, secured the exclusive rights and privileges granted by the copyright laws of the United States in and to the copyright of his 400 photographs as unpublished works of art and subsequently received from the Register of Copyrights a certificate of registration identified as Class J, Registration No. JU 13010.

EXHIBIT A

VII

On or about July 1970, plaintiff was awarded the return of the negatives declaring plaintiff's ownership therein after trial on the merits, all parties having appeared and trial held in Case No. 28100, Municipal Court of Santa Barbara-Goleta Judicial District.

VIII

On or about September 1971, plaintiff discovered for the first time a reproduction, in a later and different ad campaign, of a negative left unselected by defendants from the original 400 photos for use in the said original ad campaign, and plaintiff has information and belief that other reproductions have been made from other unselected copyrighted negatives.

IX

A duplicate original of the unselected negative which plaintiff discovered was reproduced by defendants Chace in a subsequent and different ad campaign is attached hereto as Exhibit 1, marked with an "X" and stamped with the actual language of copyright thereon.

X

A copy of a tear sheet of the subsequent advertising campaign in which said Exhibit 1 was reproduced is attached hereto marked Exhibit 2, marked with an "X".

XI

Plaintiff has notified defendants Chace that defendants Chace have infringed the copyright of plaintiff, both at common law and under the copyright laws of the United States; and defendants Chace have continued to infringe the copyright and have thereby been engaging in unfair trade practices and unfair competition to plaintiff's irreparable damage.

## SECOND CAUSE OF ACTION

XII

This second cause of action is filed pursuant to, and this court has jurisdiction of the matter complained of under, Sections 4 and 16 of the Clayton Act, 38 Stat. Sections 731 and 737, 15 USC, Sections 15 and 26; and

EXHIBIT A

plaintiff brings this action to recover damages for injuries sustained due to violation by defendants of 15 USCA, Sections 1 and 2, commonly known as the Sherman Act. Further, plaintiff also brings this cause of action as arising out of and constituting part of the same cause of action filed as the First Cause of Action herein and, therefore, this court is conferred jurisdiction by pendent jurisdiction.

XIII

Plaintiff repeats and repleads the allegations contained in paragraphs I through X of the First Cause of Action herein and by this reference makes them a part hereof as though set forth at length herein.

XIV

In the commercial photography industry, there exists a market for "secondary use" of photographs, i.e., a subsequent use in later ad campaigns of photographs taken for use in an original particular ad campaign where those photos were selected or negatives rejected. Because the price of the photos are consonant with the usage and magnitude of that original ad campaign, this market is frequently in conflict as to the ownership of the negatives and photographs. Both advertising agencies and photographers claim conflicting ownership of the negatives because of the lucrative reuse of photographs for subsequent related and unrelated ad campaigns in similar and different media, nationwide and local. In accordance with this conflict, the aforementioned action in the Santa Barbara-Goleta Municipal Court was filed by defendants Chace against plaintiff for ownership of the negatives aforementioned. Defendants Chace lost the suit and ownership was awarded to plaintiff herein.

Because of the great profit to be gained by the secondary use of photographs bought and negatives rejected for an original campaign, using those rejected photographs and negatives for subsequent and different clients, campaigns, media and purposes, defendant has sought to capture full control of the secondary market in its geographical location by intimidating photographers by the magnitude of defendant's size and control over the local commercial photography industry in the geographical location by lawsuits

EXHIBIT A

and boycotts, including blacklisting and other attempts to monopolize the secondary picture market.

XV

At all times herein mentioned, defendants Chace were by far the largest advertising agency in the Santa Barbara and tri-counties area surrounding Santa Barbara and had numerous interstate clients headquartered in and out of the State of California and use media in and out of the State of California to place its advertisements, using photographs from photographers in and out of the State of California, and extensively use the commercial photography industry in the local geographical area, as well as intrastate and interstate.

XVI

In order to properly conduct its business and provide necessary and essential services to customers, plaintiff maintains a color lab, camera shop and full photographic service center in Santa Barbara. In the course of said business, plaintiff maintains business relationships with camera shops, photographers, lithographers, photo suppliers and users, and advertising agencies, all in the Santa Barbara area as well as nationwide, whereby plaintiff became confident that the quality of his work and reputation in the Santa Barbara community would be the normal and customary considerations of his customers, suppliers, vendors and fellow photographers in dealings.

XVII

Defendants Chace, because of their size, comprise a large part of the clientele of plaintiff's customers, suppliers, vendors, lithographers, fellow photographers, people and other businesses dealing largely in the area of commercial photography; and defendants' magnitude of photographic supply needs dictate the livelihood of many of the people in the commercial photography industry in the same geographical area as that of plaintiff.

XVIII

In order to properly conduct its business and provide necessary and essential services to its customers, plaintiff requires that its work and goods

EXHIBIT A

are judged in a fair manner consistent with normal standards of quality in the profession and the confidence of the commercial photography population in the geographical area.

XIX

Defendants Chace wrote and caused to be published a certain communication, a copy of which is attached hereto as Exhibit 3, which was widely distributed throughout the commercial photography industry at the insistence of defendants Chace, and was further placed into the files of defendant BETTER BUSINESS BUREAU OF SANTA BARBARA, INC. pursuant to a secret and unwritten agreement to boycott plaintiff.

XX

Plaintiff alleges on information and belief that the contents of said letter, through the efforts of defendants, were made known to the following commercial photography outlets, photographers, artists, suppliers and users of photographic goods: Santa Barbara Photo Engraving, Santa Barbara Engravers, Haagen Printing, Channel Lithograph, Santa Barbara Printers, John Adams & Sons, Los Angeles, Engravers, Ramon Glass, Arlene Glass, Dirk Crusor, Lettergraphics, Los Angeles, Typehouse, James Chin, Graden Randle, Otto Bates, Al Busch, Hal Clason, Tim Putz Professional Photographers, Brooks Institute of Photography, approximately 14 employees of defendants Chace who all have key positions of national influence over national advertising accounts, Anderson Camera & Hi Fi, Weston Camera Shop, Honeywell Industries, Jerome Weidmann, amateur photographer, Snaeffel Electronics Co., Road Associates Lithographers and Printers, and other concerns, large and small, constituting the commercial photography industry.

XXI

Because of the widespread publicity, the involvement of the BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., and the order to defendants' staff to "notify vendors . . .", the following other commercial photography outlets became aware of the letter and its contents: Polaroid Corporation, Ponder & Best, Inc., Everready, Inc., Dupont Co., the Kodak

EXHIBIT A

Company, Sylvania, Inc., and others in that field, as well as other potential users of plaintiff's photographic services, including but not limited to the United States Air Force, U. S. Department of Defense, and the President of the United States, Richard M. Nixon.

### XXII

The widespread mailing and distribution of this letter to all phases of the commercial photography industry and the availability thereof through defendant BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., caused a good part of the commercial photography industry and certain unidentified coconspirators to engage in acts of boycott, preventing plaintiff from operating and servicing customers in that geographical area and nationwide.

### XXIII

Because of the numerous acts of boycott pursuant to said letter, in particular the phrase, ". . . we will reject any part of any job that has in any way been serviced by any individual in National Photo Services . . ." and the phrase, "National Photo Services shall be afforded no further work of any kind . . . from outside photographers with whom we work", various coconspirators have not placed business with plaintiff and caused plaintiff's atrophy.

### XXIV

Plaintiff put into effect a system which would fully service the photography business of Brooks Institute of Photography at an enormous profit for plaintiff and, as a result of said letter and the acts of certain named and unnamed coconspirators at Brooks Institute, after receipt of said letter, prevented said system to be used by boycotting plaintiff at the Institute.

### XXV

Knowledge of the letter and acts of conspiracy in accordance therewith on the part of large franchisors and supply houses in the commercial photography field who coconspired with defendants caused plaintiff not to obtain concessions, dealerships and supplies necessary to service its

EXHIBIT A

customers in the geographical area.

XXVI

It was part of said conspiracy that all photographers dealing with defendants would not deal with plaintiff, creating an atrophy of plaintiff's potential and actual commercial photography development services. It was further part of said conspiracy that all of said commercial photographers would breach existing agreements with plaintiff and discontinue business with plaintiff, and certain commercial photographers did therefore discontinue said business with plaintiff.

XXVII

As a result of the aforesaid acts, plaintiff has sustained damages in the amount of $300,000 or more according to proof and is entitled to recover under the Acts of Congress of July 2, 1890, and October 15, 1914, commonly known as the Sherman Antitrust Act and the Clayton Act, threefold the amount of damages, to wit, $900,000.

XXVIII

Plaintiff is entitled to reasonable attorney's fees.

## THIRD CAUSE OF ACTION

XXIX

Plaintiff repeats and repleads the allegations contained in paragraphs I through X of the first cause of action and paragraphs XII through XXVI of the second cause of action and by this reference makes them a part hereof as though set forth at length herein.

XXX

As a result of the aforesaid acts, defendants have restrained, disparaged and destroyed plaintiff's trade whereas plaintiff has sustained damages in the amount of $300,000 or more according to proof and is entitled to recover under the Cartwright Act of the State of California, Business & Professions Code, Section 16720, of that state, threefold the amount of damages, to wit, $900,000.

. . .

EXHIBIT A

## FOURTH CAUSE OF ACTION

XXXI

Plaintiff repeats and repleads paragraphs I through X, inclusive, of the first cause of action and paragraphs XII through XXVI of the second cause of action and by this reference makes them a part hereof as though set forth at length herein.

XXXII

On or about August 1, 1969, and at various later times, defendants published and circulated said letter marked Exhibit 3 falsely and maliciously and with intent to injure, disgrace and defame plaintiff and cause plaintiff to be driven out of business by publishing said letter. Said letter was read by many persons in the commercial photography industry where plaintiff earlier enjoyed a good and natural reputation, whereby said language was intended to cast doubts on the quality and integrity of plaintiff's production and services in that field, as well as a warning to the industry not to deal with plaintiff, causing him to sustain disparagement of his trade, degradation, loss of business and profits, and ill repute in his profession and field of endeavor, as well as personal mortification, nervous shock, strain mental anguish and humiliation, all to his damage in the sum of $300,000.

XXXIII

As a direct and proximate result of the foregoing, plaintiff has suffered pecuniary loss in his profession as a commercial photographer in the following respects:

1. An unusually large percentage of clientele having placed business elsewhere;

2. There has been a sharp decline in the amount of new business normally expected and expected from the aforementioned system of servicing Brooks Institute of Photography at a great profit;

3. Plaintiff has been forced into new fields of endeavor in order to be a success; and

4. Plaintiff's credit has been impaired.

. . .

EXHIBIT A

XXXIV

Plaintiff does not know at this time the full extent of pecuniary loss resulting from the foregoing but is informed and believes and thereon alleges that said loss is a continuing one and that the amount of said loss will be in the sum of $300,000 or more; and plaintiff prays leave of court to amend the amount according to proof. Further, plaintiff has been damaged in the amount of $300,000 general damages.

XXXV

In order to dissuade defendants from further acts of malice, exemplary damages should be awarded in the sum of $900,000.

WHEREFORE, plaintiff prays judgment as follows:

### ON THE FIRST CAUSE OF ACTION:

1. That defendants Chace, their agents and servants be enjoined, during the pendency of this action and permanently, from infringing said copyright of plaintiff in any manner;

2. That defendants Chace be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendants' infringement of said copyright and said unfair trade practices and unfair competition and to account for all gains, profits and advantages derived by defendants Chace by said trade practices and unfair competition, and all gains, profits and advantages derived by defendants Chace by their infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than $250.00;

3. That defendants Chace be required to pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to plaintiff by the court; and

4. That plaintiff have such other and further relief as is just.

### ON THE SECOND CAUSE OF ACTION:

1. That defendants and each of them be enjoined perpetually from combining or acting in consort to interfere with plaintiff's free exercise of

EXHIBIT A

his business;

2. For a joint and several judgment against defendants in the sum of $900,000 being threefold the damages sustained by plaintiff;

3. For reasonable attorney's fees;

4. For costs of suit incurred herein; and

5. For such further relief as is just.

ON THE THIRD CAUSE OF ACTION:

1. That defendants and each of them be enjoined perpetually from combining or acting in consort to interfere with plaintiff's free exercise of his business;

2. For a joint and several judgment against defendants in the sum of $900,000, being threefold the damages sustained by plaintiff;

3. For reasonable attorney's fees;

4. For costs of suit incurred herein; and

5. For such further relief as is just.

ON THE FOURTH CAUSE OF ACTION:

1. For the sum of $300,000 or more special damages;

2. For the sum of $300,000 general damages;

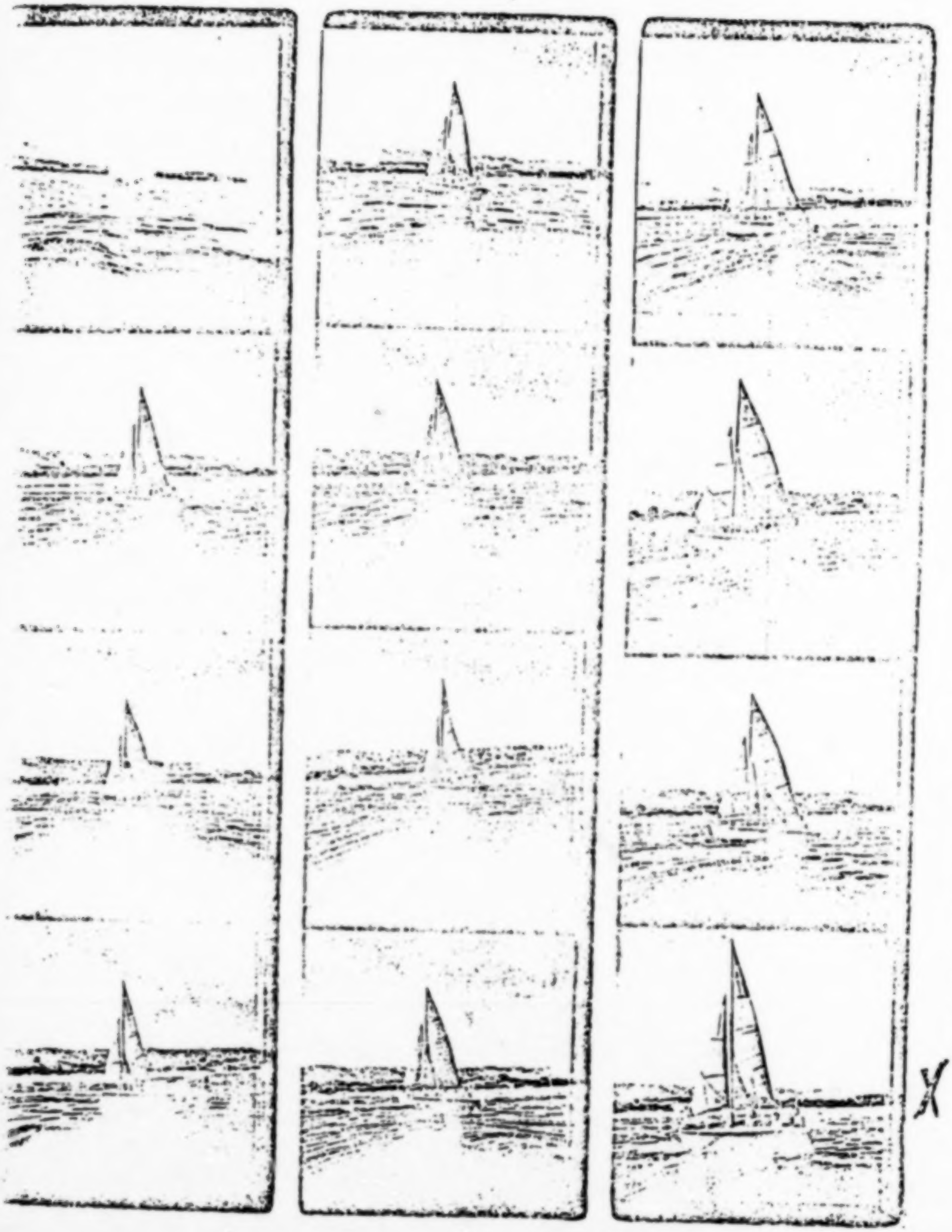
3. For the sum of $900,000 exemplary damages;

4. For costs of suit incurred herein; and

4. For such further relief as is just.

George N. Nicolau
Attorney for Plaintiff

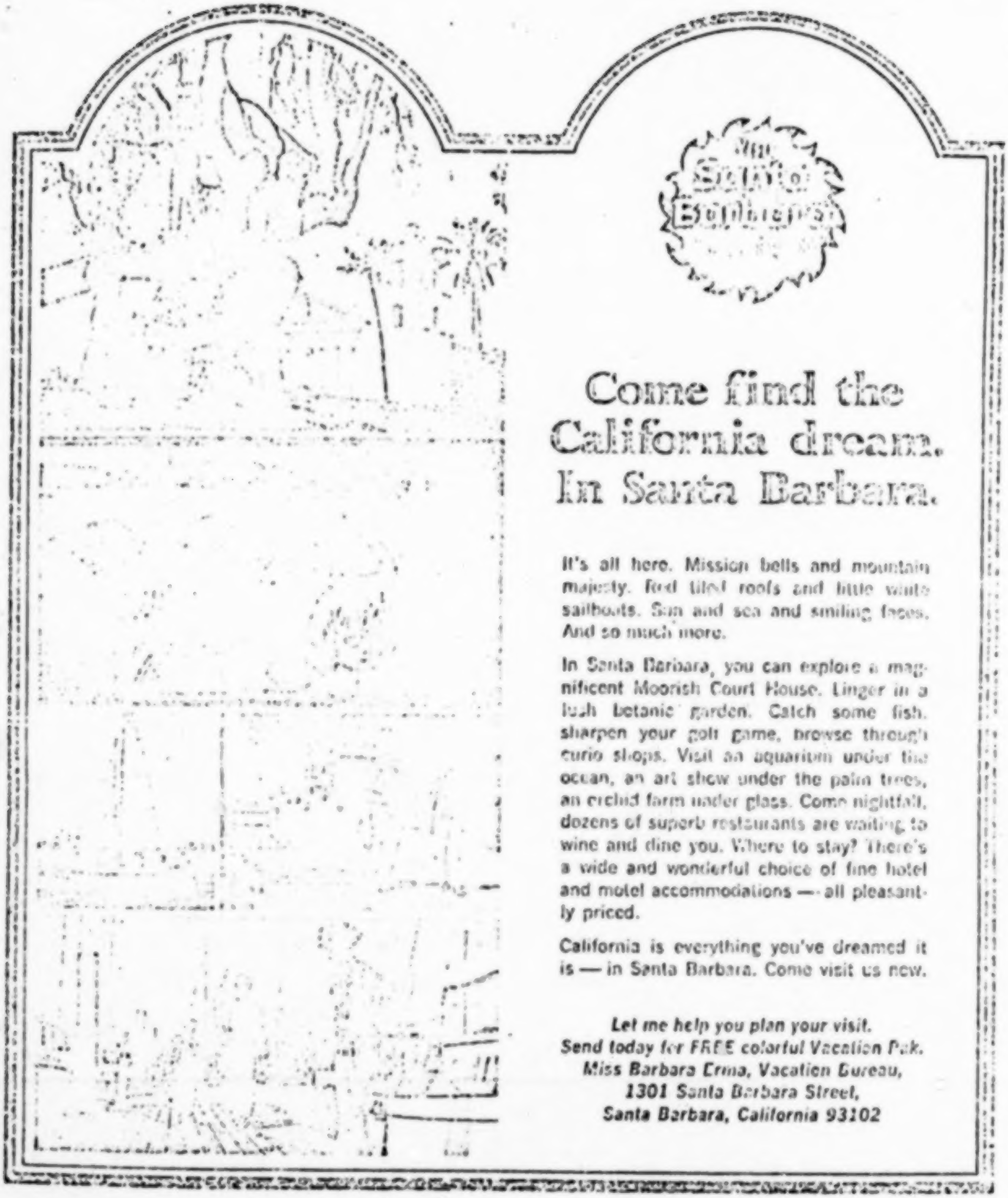
**EXHIBIT A**



Copyright 1970 by Michael R. Wood, dba National Photo Services. All rights reserved — including the right to print, reprint, to copy the work, the right to distribute copies of the work. No reproduction without written consent of Michael R. Wood.

EXHIBIT 1

EXHIBIT A



# Come find the California dream. In Santa Barbara.

It's all here. Mission bells and mountain majesty. Red tiled roofs and little white sailboats. Sun and sea and smiling faces. And so much more.

In Santa Barbara, you can explore a magnificent Moorish Court House. Linger in a lush botanic garden. Catch some fish, sharpen your golf game, browse through curio shops. Visit an aquarium under the ocean, an art show under the palm trees, an orchid farm under glass. Come nightfall, dozens of superb restaurants are waiting to wine and dine you. Where to stay? There's a wide and wonderful choice of fine hotel and motel accommodations — all pleasantly priced.

California is everything you've dreamed it is — in Santa Barbara. Come visit us now.

*Let me help you plan your visit.*
*Send today for FREE colorful Vacation Pak.*
*Miss Barbara Erma, Vacation Bureau,*
*1301 Santa Barbara Street,*
*Santa Barbara, California 93102*

2278

Prepared By
Chace Co. Advertising
114 East De La Guerra Street
Santa Barbara, Calif. 93101

EXHIBIT 2

EXHIBIT A

chace company/advertising inc.

Chace Staff

August 1, 1969

Mike Woods and/or other personnel of National Photo Services are forbidden entrance to our offices and shall be afforded no further work of any kind either from us or from outside photographers with whom we work.

All vendors shall be notified that we will reject any part of any job that has in any way been serviced by any individual in National Photo Services including but not limited to photo processing and other lab work.

Thomas Chace

114 E. DE LA GUERRA, SANTA BARBARA, CALIF. 93101 □ (805) 965-7317

EXHIBIT 3

**EXHIBIT A**

(VERIFICATION — 446, 2015.5 C. C. P.)

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

I, MICHAEL R. WOOD, being first duly sworn, depose and say that I am the plaintiff

in the above entitled action; I have read the foregoing COMPLAINT FOR: INFRINGEMENT OF COPYRIGHT AND UNFAIR COMPETITIO (28 USCA 1338); TREBLE DAMAGES AND INJUNCTION UNDER SHERMAN ANTITRUST ACT - GROUP BOYCOTT (28 USCA 1337; 15 USCA 15 and 2 TREBLE DAMAGES AND INJUNCTION FOR RESTRAINT OF TRADE;DEFA T

and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

[illegible]

[illegible] (date) [illegible] (place), California

Subscribed and sworn to before me this 24th day of May 1972.

Notary Public for said State

Signature

(PROOF OF SERVICE BY MAIL — 1013a, 2015.5 C. C. P.)

STATE OF CALIFORNIA
COUNTY OF } ss.

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is:

On ______________, 19____ I served the within ______________

on the ______________ in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at ______________ addressed as follows:

Best Copy Available

I certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

Executed on ______________ (date) at ______________ (place), California

______________
Signature

---

*Both the verification and proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

EXHIBIT A

617

Filed #21
March 27, 1974

CAVALLETTO, WEBSTER, MULLEN
& McCAUGHEY
Attorneys at Law
112 East Victoria Street
P. O. Box 779
Santa Barbara, California 93102
(805) 966-1501

Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, dba NATIONAL PHOTO SERVICES,

Plaintiff,

v.

CHACE COMPANY ADVERTISING, INC., a corporation; THOMAS CHACE an individual; and BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., a corporation,

Defendants.

NO. 72-1179-RJK

CONDITIONAL NOTICE OF NON-OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER TERMINATING DISCOVERY

STATE OF CALIFORNIA ) ss.
COUNTY OF SANTA BARBARA)

Defendants CHACE COMPANY ADVERTISING, INC. and THOMAS CHACE hereby give notice that they do not oppose the Plaintiff's above-identified Motion, provided that the Court vacates the Order as to all parties instead of just as to the Plaintiff.

These Defendants state that it would be highly prejudicial to all Defendants if the Court were to vacate the Order only as to the Plaintiff. (Defendants also request that the Court appoint a Special Master to supervise the discovery and suggest WILLARD W. McEWEN, JR., ESQ., who is a United States Magistrate as the Special Master.)

/// /// ///

EXHIBIT B

DATED: March 25, 1974

CAVALLETTO, WEBSTER, MULLEN
& McCAUGHEY
Attorneys for Defendants

Mailed March 25, 1974 at
Santa Barbara, California

By /s/ James W. Brown
James W. Brown

/// /// ///

EXHIBIT B

## PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA )
                                       ) ss.
COUNTY OF SANTA BARBARA)

I am a citizen of the United States and a resident of the county aforesaid, I am over the age of eighteen years and not a party to the within entitled action; I am employed in the law offices of CAVALLETTO, WEBSTER, MULLEN & McCAUGHEY, Attorneys at Law, who are duly qualified to practice before the United States District Court for the Central District of California and under whose direction I make this service; my business address is:

112 East Victoria Street, Santa Barbara, CA 93101

On March 25, 1974, I served the within CONDITIONAL NOTICE OF NONOPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER TERMINATING DISCOVERY, on the parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Barbara, California, addressed as follows:

Michael R. Wood
1266 Coast Village Road
Santa Barbara, CA 93108

Monte Widders, Esq.
Attorney at Law
111 Garden Street
Santa Barbara, CA 93101

The copies mailed bear a notation of the date and place of mailing.

I declare under the penalty of perjury, that the foregoing is true and correct.

Executed on March 25, 1974, at Santa Barbara, California.

/s/ Janet D. Speaker
Janet D. Speaker

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE ROBERT J. KELLEHER, JUDGE PRESIDING

- - -

MICHAEL R. WOOD, dba
NATIONAL PHOTO SERVICES,

Plaintiff,

vs.

CHACE COMPANY ADVERTISING, INC.,
a corporation, et al.,

Defendants.

Civil Action
No. 72-1179-RJK

- - -

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, April 1, 1974

EDWARD NEWLANDER
Official Reporter
442-C United States Court House
Los Angeles, California 90012
Telephone 622-3232

- - -

EXHIBIT C

APPEARANCES:

| | |
|---|---|
| The plaintiff, pro se: | MICHAEL L. WOOD<br>1266 Coast Village Road<br>Santa Barbara, California 93108 |
| On behalf of defendants Chace Company Advertising, Inc. and Thomas Chace: | CAVALLETTO WEBSTER MULLEN & MC CAUGHEY<br>by: HUGH J. HAFERKAMP<br>112 East Victoria Street<br>Santa Barbara, California 93101 |
| On behalf of defendant Better Business Bureau of the Tri-Counties, Inc.: | MONTE L. WIDDERS<br>1111 Garden Street<br>Santa Barbara, California 93104 |

- - -

EXHIBIT C

LOS ANGELES, CALIFORNIA; MONDAY, APRIL 1, 1974; 10:00 A.M.

- - -

THE CLERK: No. 8 on the calendar. Case No. 72-1179, Michael R. Wood vs. Chace Company Advertising, Inc., et al.

Hearing various motions of plaintiff.

MR. WOOD: Michael Wood, for plaintiff.

MR. WIDDERS: Monte L. Widders, for the defendant Better Business Bureau.

MR. HAFERKAMP: Hugh Haferkamp, your Honor, for Chace Company Advertising and Thomas Chace.

THE COURT: There will be a special master appointed to supervise all discovery in this case.

There will be referred to and placed before the special master all of the matters which are raised or seem to be raised by the various motions that have been filed, which are set for hearing this morning.

Depositions will be taken before the special master. The Court is about to set an hour and date for the taking of the deposition of the plaintiff first, and of Chace thereafter.

With respect to the pending interrogatories, those will be withdrawn by the plaintiff in their entirety, and they will be refiled and re-served after first having purged them of those matters which appear to have been taken from a form book by a plaintiff appearing in pro se and which seem to have no relationship whatever to this case, many of whi

EXHIBIT C

of which are duplications of others and repetitions of others, and many of which are in other respects suspect.

Any disputes that exist between the parties as to when, whether or where responses by way of discovery should be made will be laid before the special master for his resolut resolution and for the filing by him of a report before this court, if it appears necessary so to do; and each side is on notice that if the patience of the parties and counsel are not as of this time exhausted or close to being exhausted, that of the Court is, and there will be tolerated not one scintilla of impropriety or failure to discharge a duty on the part of any party or counsel in this case, without there being imposed the most severe of sanctions, including the dismissal of the action if it be a dereliction on the part of the plaintiff, or the striking of the answer if it be on the part of a defendant, together with such other sanctions as may be appropriate, including money sanctions.

The fees and expenses of the special master will be ultimately taxed as costs in the case. However, there will be advanced by each party on account of the fees and expenses of the special master $250 by the plaintiff, $250 by the defendant Chace Company Advertising, Inc., and $250 by the defendant Better Business Bureau of Santa Barbara, Inc.

The sums so ordered are to be paid into the registry

EXHIBIT C

of this court by the clerk, to be thereupon advanced to the special master on account of fees and expenses incurred by him, each such sum to be paid not later than twelve noon on April 10.

The Honorable William W. McEwen, Jr., United States Magistrate, will be appointed special master, with full powers.

With respect to the demand for production of documents, the Court, so far as it can understand the state of the record at the present time, various demands have been made, and the defendant or defendants contend that either those documents have been produced or so far as interrogatories remain unanswered that there are answers in the possession of the plaintiff or that answers are available within documents.

Each side had better take a pretty close look at his or its respective position and be satisfied that either a proper demand has been made or a proper response has been given. Any unreasonable failure to have acted reasonably and properly there will be considered a ground for the imposition of sanctions.

Is there anything remaining to be disposed of, Mr. Wood?

MR. WOOD: Your Honor, is it possible, can someone else in the U. S. Attorney's Ofice be appointed as a special master?

THE COURT: No. Why do you want someone there?

EXHIBIT C

MR. WOOD: I prefer somebody out of the Santa Barbara area. I don't really care who, just somebody out of the Santa Barbara area.

THE COURT: The United States Attorneys or their assistants are not available for the appointment as special master pursuant to the civil rules.

You have problems with the whole city of Santa Barbara, do you?

MR. WOOD: No, sir.

THE COURT: And everybody situated therein?

MR. WOOD: No, sir.

THE COURT: Well, what other implication arises from your comment?

MR. WOOD: I just feel that there would be a better look at things if the person was not in the Santa Barbara area, sir.

THE COURT: Mr. McEwen will be the special master.

Anything remaining?

MR. WOOD: In regards to responses to motions, your Honor, is it possible that the other side can respond within proper time instead of taking weeks of waiting until the last moment?

THE COURT: Every motion now pending is denied by and on behalf of every party, without prejudice. If it is not clear from what the Curt has said, that there is a

EXHIBIT C

new day dawning with respect to discovery --

The Court vacates its previous order, incidentally, under which discovery was terminated, and will allow these matters to proceed before the special master; and you may be assured that there will be at an early date a cutoff of any further discovery.

But with respect to pending motions, each is denied.

Counsel for Chace Company Advertising and Thomas Chace, pursuant to local rule 7, will prepare, serve and lodge an appropriate order carrying out the ruling of the Court.

Is there anything left undisposed of now?

MR. HAFERKAMP: I don't believe so, your Honor.

THE COURT: Gentlemen, you had better avoid, each and all of you, what could likely next occur if there is any continued performance such as has exhausted the Court's patience. There will be some sanctions that will hurt. And you had better remember that you have been told that, and you had better guide your respective performances accordingly.

MR. HAFERKAMP: May I ask one question, your Honor?

THE COURT: Yes, sir.

MR. HAFERKAMP: You indicated that the depositions were to be taken before the special master. Do you mean under his supervision or with him present?

THE COURT: Directly in his presence.

EXHIBIT C

MR. HAFERKAMP: In his presence.

MR. WOOD: Thank you, your Honor.

THE COURT: Perhaps that order ought to set a time and date for the taking of the depositions.

MR. WIDDERS: I think it should, your Honor.

THE COURT: The deposition of the plaintiff will be taken first.

When do you suggest that that should be taken, Mr. Haferkamp?

MR. HAFERKAMP: Well, I might as well start it, your Honor. I would just as soon take it in about two weeks, if that is satisfactory.

THE COURT: Don't say "about two weeks." When do you want it, as to date and time?

MR. HAFERKAMP: The 8th or the 15th of April, Monday.

THE COURT: The order will provide that the taking of the deposition of the plaintiff will be at such time and place as may be directed by the special master on April 15, at 10 a.m.

MR. WOOD: Your Honor, may I say something?

THE COURT: Yes, sir.

MR. WOOD: We do have a problem in Santa Barbara. We do not have a sufficient amount of court reporters, and this has been one reason why I had to bring both times a court reporter from Los Angeles. Every time I contacted

**EXHIBIT C**

a local court reporting outfit they said that they need at least thirty to sixty days, sometimes ninety days, advance notice.

MR. WIDDERS: Your Honor, a court reporter will be there.

THE COURT: All right.

Mr. Haferkamp, in addition to preparing under rule 7 the order as directed, you will prepare the formal order of appointment of the special master.

MR. HAFERKAMP: Yes, your Honor.

MR. WOOD: Your Honor, in regards to Thomas Chace's deposition.

THE COURT: Yes. When do you want to take that?

MR. WOOD: I would like to take it approximately one week afterwards.

THE COURT: All right. The taking of the deposition of the defendant Chace will be on April 22, 1974, at 10 a.m. at such place as may be designated by the special master.

MR. HAFERKAMP: I will put that in the order, your Honor.

MR. WOOD: Will Monte Widders help us acquire a court reporter?

THE COURT: I can't hear.

MR. WOOD: Is it possible Mr. Widders can still help assist us in getting a court reporter?

EXHIBIT C

THE COURT: You will --

MR. WOOD: Because I have no chance of getting one.

MR. HAFERKAMP: Your Honor, I suspect that perhaps the primary problem plaintiff has is credit, and if the Court would have him make a deposit with the court reporter I don't think there will be any problem making arrangements.

THE COURT: That seems to be implicitly the answer in your situation. You have been told by the Court on more than one occasion, Mr. Wood, that you have invaded an area of technical difficulty. You decided that you are going to be a fulltime lawyer with only one client, to-wit, yourself, and you are not able to do it. You haven't the vaguest idea, from what the Court sees, of what is required of a lawyer. If you have a dissatisfied client he can only complaint to you. That is not like the usual situation where a lawyer is involved.

You are held to exactly the same standard as is any lawyer in this court who is representing a client. The fact that you have elected to pursue this course as your own lawyer imposes great limitations on your ability to succeed in what you are doing. But that's your problem. And if reporters don't pay much attention to you, if they don't seem ready to honor your requests, it is perhaps just another instance in which your electing to represent yourself poses

EXHIBIT C

a difficulty.

Your disenchantment with Santa Barbara and everything apparently connected therewith probably works both ways. There is probably some disenchantment with you. You make a preposterous suggestion that lawyers in Santa Barbara can't get reporters to attend the taking of depositions. That's just not true.

You have some problems, and you're going to have to solve them.

Anything further?

MR. HAFERKAMP: Nothing further.

- - -

EXHIBIT C

#28

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, dba
NATIONAL PHOTO SERVICE,

Plaintiff,

vs.

CHACE COMPANY ADVERTISING, INC., a Corporation; THOMAS CHACE, an individual; and BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., a corporation,

Defendants.

NO. 72-1179-RJK

NOTICE OF EX PARTE APPLICATION and POINTS AND AUTHORITIES IN SUPPORT THEREOF

TO PLAINTIFF MICHAEL R. WOOD:

Notice is HEREBY given under Local Rules of the Central District of California, Rule 3(j), that on the 29th of April, 1974, at 10:00 a.m., before this Court at the Federal Courthouse, 312 North Spring Street, Los Angeles, California, or as soon thereafter as the matter can be heard, defendants will make application for an Order dismissing plaintiff's action and for sanctions for failure to comply with this Court's Orders heretofore entered Compelling Discovery, and the Orders of the Special Master made relative to Discovery.

This Ex Parte Application for Order is based upon this Notice, the pleadings, records and files in this action, the attached Memorandum of Points and Authorities, the Affidavit and Interim Report of WILLARD W. McEWEN, Esquire, United States Magistrate and duly appointed Special Master, filed herewith, the supporting Affidavits of HUGH J. HAFERKAMP, Rule 37(b), Federal Rules of Civil Procedure, and oral and documentary evidence to be presented at the hearing on said application.

DATED: April 27, 1974

CAVALLETTO, WEBSTER, MULLEN & McCAUGHEY

By ______________________
HUGH J. HAFERKAMP
Attorneys for Defendants THOMAS CHACE & CHACE COMPANY ADVERTISING, INC.

EXHIBIT D

By________________________________
MONTE WIDDERS
Attorney for Defendant BETTER
BUSINESS BUREAU

## POINTS AND AUTHORITIES

"If a party ...fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this Rule or Rule 35, the Court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:"

"...(c) An order ...dismissing the action or proceeding or any part thereof, ..."

"In lieu of any of the foregoing orders or in addition thereto, the Court shall require the party failing to obey the order ... to pay the reasonable expenses, including attorneys' fees, caused by the failure, ..."

Federal Rules of Civil Procedure, Rule 37(b)

II

The sanctions provided for by Rule 37(b) for failure to obey discovery orders are available regardless of the specific discovery rule under which the order was originally made.

Federal Practice and Procedure, Wright & Miller, Vol. 8, p 790

III

It is proper, and not an abuse of discretion, for the Court to dismiss an action for plaintiff's failure to produce documents when ordered by the Court and to appropriately provide discovery at the time of his deposition.

Grace v Fisher, C.A.2d, 1966, 355 F. 2d 21

Sperandeo v Mike Drivers & Dairy Employees Local Union No. 537, C.A. 10th, 1964, 334 F. 2d 381.

EXHIBIT D

CAVALLETTO, WEBSTER, MULLEN
& McCAUGHEY
Attorneys at Law
112 East Victoria Street
Santa Barbara, CA 93101

(805) 966-1501

Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| MICHAEL R. WOOD, dba<br>NATIONAL PHOTO SERVICES,<br>Plaintiff,<br>vs.<br>CHACE COMPANY ADVERTISING, INC.,<br>a Corporation; THOMAS CHACE an<br>individual; and BETTER BUSINESS<br>BUREAU OF SANTA BARBARA, INC.,<br>a Corporation<br>Defendants. | NO. 72-1179-RJK<br>DECLARATION OF SERVICE |

I, MONTE WIDDERS, declare:

That I am a citizen of the United States, over the age of eighteen years, residing in the County of Santa Barbara and am not a party to the above entitled action; that my business address is 111 Garden Street, Santa Barbara, California, 93101; that on April 28, 1974, I served the within NOTICE OF EX PARTE APPLICATION and POINTS AND AUTHORITIES IN SUPPORT THEREOF, on the parties in said action by hand delivering a true copy thereof to the following addresses:

Michael R. Wood
1936 C North Jamison
Santa Barbara, California

///

///

///

EXHIBIT D

Monte Widders
Attorney at Law
111 Garden Street
Santa Barbara, California 93101

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of March, 1974, at Santa Barbara, California.

MONTE WIDDERS

EXHIBIT D

688

#27

WILLARD W. McEWEN, JR., Esquire
La Rinconada Building
205 East Carrillo Street
Santa Barbara, CA 93101

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, dba,
NATIONAL PHOTO SERVICE,

Plaintiff,

vs.

CHACE COMPANY ADVERTISING, INC., a Corporation; THOMAS CHACE, an individual; and BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., a corporation,

Defendants.

NO. 72-1179-RJK

AFFIDAVIT & INTERIM REPORT OF SPECIAL MASTER

I, WILLARD W. McEWEN, JR., state as follows:

1. I am an attorney at law duly admitted to practice before the above-entitled Court, a United States Magistrate appointed by this Court, and I am the Special Master heretofore appointed in this action to supervise Discovery Proceedings. This Affidavit will represent an Interim Report to the Court on certain aspects of the Discovery Proceedings conducted since my appointment.

2. The Order of Court entered pursuant to the hearing on April 1, 1974 specified that Plaintiff MICHAEL R. WOOD was to appear for his Deposition on April 15, 1974 at 10:00 a.m. at a place to be designated by me. I designated the conference room in the offices of CAVALLETTO, WEBSTER, MULLEN & McCAUGHEY, 112 East Victoria Street, Santa Barbara, California, as the place for plaintiff's Deposition and plaintiff was duly notified. Although I was present with the court reporter and counsel at 10:00 a.m. on April 15, 1974 at the designated place, plaintiff failed to appear for his Deposition in violation of the Court's Order. After considerable delay and great inconvenience to all

EXHIBIT E

persons concerned, Michael Wood finally presented himself at approximately 2:40 p.m. on that day. His Deposition commenced approximately 3:00 p.m. and continued until 5:00 p.m. that date, whereupon it was continued to Tuesday morning at 8:30 a.m.
9:00 a.m.

3. On Tuesday, April 16, 1974, although I, the court reporter and counsel were present at the appointed time and place, Plaintiff MICHAEL R. WOOD failed to appear. Plaintiff appeared at the appointed place at approximately 9:45 a.m., stating that he had overslept. At that time the interested persons reassembled and plaintiff's Deposition recommenced shortly thereafter. The Deposition proceeded through Tuesday and was continued to 9:00 a.m., Wednesday, April 17, 1974.

4. On the afternoon of April 16, 1974, I ordered Plaintiff MICHAEL WOOD to produce the tape recordings of conferences he had had with three persons, OTTO BAITZ, STANLEY DUNLAP, and ROBERT SUTTON, no later than 9:30 a.m. on April 17, 1974 in my office for copying. Plaintiff violated that Order and failed to produce the subject tapes until Thursday afternoon, April 18, 1974. Plaintiff made numerous attempts to avoid production of said tapes and it was only after substantial inconvenience to me and to the defendants in the matter that such production was finally made.

5. On Monday, April 15, 1974, counsel for defendants presented Plaintiff MICHAEL WOOD with a list of documents requested for production at his Deposition. I was advised by both Mr. Haferkamp and Mr. Widders, without contradiction by Mr. Wood, that Mr. Wood had agreed on April 1, 1974, to produce all documents he had in his possession or control during his Deposition upon presentation of a list of requested documents by counsel. The presentation of the list initiated a series of sincere efforts to procure production and identification of records possessed or controlled by the plaintiff. Mr. Wood testified

EXHIBIT E

on various occasions that he had only one page of notes pertaining to the subject matter of this action, but subsequently changed his position to the statement that he did not know the nature and extent of records he possessed or controlled. On Monday afternoon, it was agreed that Mr. Wood would go through the documents he had available in his apartment and bring them to the Deposition Tuesday, April 16, 1974.

6. On Tuesday, April 16, 1974, Mr. Wood presented himself with no documents except for the two pages of an investigator's report which had been made Exhibits to the Deposition of Mr. Wood taken in June, 1973. After considerable discussion and extensive efforts by counsel to identify documents and records, I ordered Mr. Wood to produce the records available on Wednesday morning, April 17, 1974.

7. On Wednesday, April 17, Mr. Wood produced approximately 10 documents, all of which were copies of documents that had been provided to Plaintiff Wood by the defendants. Mr. Wood did not produce any documents from his own records.

8. During the balance of the week, Mr. Wood failed to produce any of his own documents and records. On Friday, April 19, 1974, pursuant to stipulation of all parties, I ordered Plaintiff Wood to make available for inspection all records in his possession on April 26, 1974 at 9:30 a.m. at his apartment, 1936 C North Jamison, Santa Barbara, California. I also ordered Mr. Wood to produce at that time and place all records in the Santa Barbara area subject to his control, including certain records held by his bookkeeper, Mr. Jack Putnam, 209 Vereda Leyenda, Goleta, California, and certain records stored in the attic of Plaintiff Wood's previous place of business at 1266 Coast Village Road, Santa Barbara, California. In addition thereto, Mr. Wood was to make a good faith effort to procure certain records and documents relating to his business which he felt were in the

EXHIBIT E

custody of his father, Mr. George Wood, in McLean, Virginia.

9. On April 19, 1974, I continued Mr. Wood's Deposition to April 29, 1974, at 10:00 a.m. at the same location. I advised Mr. Wood that it was my interpretation of the Court's Order that Mr. Wood's Deposition was to be concluded prior to the taking of Mr. Chace's Deposition, which had been scheduled by Court Order for April 22, 1974 at 10:00 a.m. I also advised Mr. Wood that, to avoid any possible failure to comply with the Court's Order relative to Discovery, I would permit him to commence interrogating Mr. Chace at the scheduled time subject to continuing the interrogation upon motion of any defense counsel to discontinue the Deposition of Mr. Chace until Mr. Wood's Deposition was completed. Accordingly, Mr. Chace's Deposition was commenced in accordance with a Court Order on April 22, 1974 at 10:00 a.m.

Mr. Wood Commenced interrogation of Mr. Chace at the duly scheduled time reflected in the Court Order. The course of the Deposition proved quite difficult because of Mr. Wood's unorthodox and cumbersome questions. Although numerous objections were made to his inappropriate and improper questions, Mr. Wood repeatedly followed lines of questioning after appropriate objections had been sustained by me. Although I attempted to inform Mr. Wood of certain procedures, Mr. Wood refused to accept this instruction and advice. After a great deal of undue time consumption, the counsel for Mr. Chace moved for a continuance of the Deposition until after Mr. Wood's production of documents on April 26, 1974. I granted the motion and ordered the Deposition of Thomas Chace continued to April 29, 1974, at which time counsel would report to the Special Master relative to the production of documents scheduled for April 26, 1974.

10. On the afternoon of April 25, 1974, Plaintiff Wood came to my office and requested that I issue an Order

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requiring a certain woman employed by Eagles-Palmer, Inc., to produce certain documents in her custody that allegedly belonged to Chace Company Advertising, Inc. I advised Mr. Wood that I did not consider that my authority extended to such an Order and indicated that that was the office of a subpoena. Mr. Wood then stated that he would make an application to the Court for the issuance of a subpoena to require this woman to produce the documents in question. He also stated that he was going to contact Judge Kelleher with respect to certain alleged destruction of documents. I advised Mr. Wood that he was, of course, free to make such an application to the Court, but that such application would have no effect upon his obligation to produce documents on April 26, 1974 as I had ordered. Mr. Wood requested that I continue his Deposition and that of Mr. Chace from April 29, 1974 to a later date to permit him to make the application to the Court. I specifically advised Mr. Wood that I would not grant such a postponement and that I expected the Depositions to go forward as scheduled following the production of documents.

11. In conluding this Interim Report, I would like to advise the Court that it has been my observation that Mr. Wood has been most uncooperative in the Discovery efforts with which I have been associated to this date. He has failed to observe the orders of this Court by prompt compliance therewith, causing substantial inconvenience to the attorneys, the court reporters, and to myself as Special Master. Additionally, he has failed to comply promptly with the Orders that I have entered in this matter, also causing substantial inconvenience to the parties, the court reporters, and myself as a result thereof. Mr. Wood has been evasive in responding to interrogation during his Deposition, frequently asserting lack of recollection, lack of necessary records (some of which was obviously his own doing), and the fact that he had not "thought about" certain subjects which were

EXHIBIT E

obviously subjects upon which he could have expected interrogation. Many of the answers denying knowledge and recollection stretched one's credulity to the utmost and on several occasions I found it impossible to believe that Mr. Wood could not have recalled the particular point. In many respects, Mr. Wood's approach to the Discovery Proceedings has been cavalier and has certainly bordered upon being contemptuous, if not actually so.

12. At this point, I would like to request that the Court confirm the correctness of my interpretation of the Order relative to the Deposition of Mr. Wood and Mr. Chace. As I have indicated, I interpret the Order as intending that Mr. Wood's Deposition be completed prior to the taking of Mr. Chace's Deposition. I would appreciate confirmation as to whether that interpretation is correct. Additionally, the Clerk of the Court has not transmitted to my office the funds which were to have been deposited by the parties for compensation for the Special Master. I would request the Court to remind the Clerk of this previous Order and would further request that the Court order the parties to deposit an additional $200.00 each for future compensation. Although I have attempted to minimize charges by not being present during some of the depositions, there has been a great consumption of time by virtue of telephone interruptions involving requests by defense counsel for rulings as to Mr. Wood's position. I anticipate substantial additional time being required.

Respectfully submitted,

WILLARD W. McEWEN, JR.,
Special Master

Subscribed and sworn to before
me this 27th day of April, 1974.

LYNN PERRY
Notary Public in and for said
County and State.

OFFICIAL SEAL
LYNN PERRY
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SANTA BARBARA COUNTY
My Commission Expires June 14, 1975

EXHIBIT E

CAVALLETTO, WEBSTER, MULLEN
& McCAUGHEY
Attorneys at Law
112 East Victoria Street
Santa Barbara, CA 93101

(805) 966-1501

Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, dba
NATIONAL PHOTO SERVICES,

Plaintiff,

vs.

CHACE COMPANY ADVERTISING, INC., a Corporation; THOMAS CHACE an individual; and BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., a Corporation,

Defendants.

NO. 72-1179-RJK

DECLARATION OF SERVICE

I, MONTE WIDDERS, declare:

That I am a citizen of the United States, over the age of eighteen years, residing in the County of Santa Barbara and am not a party to the above entitled action; that my business address is 111 Garden Street, Santa Barbara, California, 93101; that on April 28, 1974, I served the within AFFIDAVIT & INTERIM REPORT OF SPECIAL MASTER, on the parties in said action by hand delivering a true copy thereof to the following addresses:

Michael R. Wood
1936 C North Jamison
Santa Barbara, California

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EXHIBIT E

Monte Widders
Attorney at Law
111 Garden Street
Santa Barbara, California 93101

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of March, 1974, at Santa Barbara, California.

MONTE WIDDERS

EXHIBIT 5

SANTA BARBARA NEWS-PRESS

SANTA BARBARA, CALIFORNIA, THURSDAY EVENING, FEBRUARY 5, 1976 PAGE B 1

# Chamber 'will be heard,' new president declares

By Chet Holcombe

News-Press Staff Writer

The new president of the Santa Barbara City and County Chamber of Commerce, in the presence of city and county officials, declared last night that this year the organization "will be heard on political affairs of importance to the community."

Willard W. McEwen Jr., 41, a lawyer and chamber chief executive just installed by Mayor Shiffman, told the 76th annual dinner meeting at the Miramar Hotel that "the complexion of the group has changed. Our purpose is to support the business and economy, to serve as good citizens and to build environmental and social values of the community, through a program of committees and task forces."

Dr. William J. Teague, Purex Corp. Ltd. administrative vice president, the guest speaker, lauded local actions in getting business studies on the public school curriculum, saying "this is not only good for the children, but the teachers, too."

Business rewards employes on their performance, which doesn't make for popularity of the system among some people, Teague said. People who had to work to make it are not particularly liked. "The folk heroes among many are those who inherited money."

The speaker, a former educator himself, asserted that "it is not right for teachers to send children home and go out on strike against the school board. The teachers may have justification to walk out, but they should not complain when the taxpayers refuse to vote for new school bonds."

Teague, introduced by Robert Blau, local manager of Safeco Title Co., said that "everybody is for profit — no one asks to have his salary cut. Often the only time city councilmen agree is when they vote to raise their pay. 'Excess profit' is what you make, not me!"

Thomas Brashears, the outgoing president, criticized the City Council for its action last summer cutting off use of bed tax money for paid advertising. He predicted that business people will approve the council's increasing the bed tax from 6 to 7 percent and using 1.5 percent for the advertising. The plan is now being considered by the county supervisors.

Brashears told the more than 300 persons attending that the chamber had made itself known on the issue of annexing Goleta, downtown development plans, a revision of the city charter, plans for Stearns Wharf, cityhood for Isla Vista, and business system studies in schools.

In addition to the new president, the mayor installed Silvio DiLoreto, realtor, as president-elect; Al Paul, Santa Barbara Research Center, vice president; John Kemp, public relations man, vice president, and Brashears, The Office Mart, treasurer.

Stanley C. Lowry, executive vice president retiring April 1, was given a standing ovation for his 24 years of service. The Rev. Martin L. Brewer, Our Lady of Sorrows Catholic Church pastor, gave the invocation. The city, county and other officials were introduced, and several past presidents and committee leaders were identified.

EXHIBIT E

SANTA BARBARA NEWS-PRESS

FRIDAY EVENING, JUNE 20, 1975 C PAGE B-1

# Chamber head assails plan to halt advertising program

By Chet Holcombe

News-Press Staff Writer

The announced intention of four members of the City Council to scuttle the entire bed tax-supported community advertising campaign will seriously hurt the $70 million annual industry, contends Willard McEwen Jr., Chamber of Commerce president-elect.

McEwen said that "removing the entire $130,000 annual bed tax support will not merely reduce Santa Barbara's advertising and promotion program. It will end it. There are no other funds."

Since the advertising program began in 1962, the dollars spent by tourists here has more than doubled, he said. "It doesn't make economic sense to jeopardize the thousands of local jobs dependent on the tourist industry in order to keep a few people on the public payroll."

Representatives of groups alarmed about the future of local jobs and revenues will attend next Tuesday's City Council meeting, McEwen said, to protest final passage of the no-advertising ordinance which proponents are forcing through on an "emergency" basis.

Concerned citizens are contacting Council members to urge that last Tuesday's 4-3 vote to scrap the advertising program not be made final.

A study of the spending of tourist dollars here last year shows that they bought $12 million in food and beverages; $11 million worth of hotel and motel accommodations; $8.7 million in items from local stores; $5.8 million in automobile service and products; $4 million for professional services (barbers, beauty shops, laundries, etc.); and another $4 million for recreation, McEwen said.

"By the time these tourist dollars were spent and respent throughout our city," said McEwen, a lawyer, "nearly everybody benefited. Why would these Council members seek to cripple the goose that lays these golden eggs?"

There is ample evidence that the Santa Barbara tourist industry has been effectively stimulated by the advertising in various media around the state and nation, paid for by the 8 percent surcharge (bed tax) paid by the visitors themselves, said McEwen, himself instrumental in drafting the 1962 bed tax ordinance.

Requests from prospective visitors for information traceable to the advertising are averaging over 1,000 a month. Most attracted come without writing ahead. But a follow-up campaign shows that of those who did write more than 25 percent actually came.

"THE BED TAX was created specifically to produce funds for tourist promotion without tapping the general fund. Some 40 percent of the bed tax funds goes to advertising, administered by the All Year Assn., a Chamber nonprofit subsidiary."

The AYA's advertising committee includes five people from other areas of local business. Four members are in professional advertising, but are not associated with the local agency which creates and places the ads, McEwen said.

Two Santa Barbara films produced by the AYA are shown on TV stations around the nation, to audiences averaging more than a million monthly — at no cost except for shipping and a $15 fee per showing by the firm that places it with the TV station, he said.

"It is important to all Santa Barbarans that the advertising campaign continue without interruption. Continuity is vital. Momentum once lost is difficult to rebuild," McEwen declared. "If we are forced to stop seeking the tourist dollar, we will lose a substantial portion of our trade to our well-financed competitors."

The advertising money is perhaps the only item in the city budget that puts more money right back in, he said. "We cannot afford to lose jobs and revenue. We cannot afford to scrap the advertising program at a time when our economy needs to be bolstered, not crippled."

EXHIBIT G

# Chamber installs Nissler as 1973 president at dinner

The Santa Barbara Chamber of Commerce changed its command last night with the installation of Carl Nissler Jr. as president.

Other new officers seated at the 73rd annual dinner were Rodney J. Lamb, Thomas Brashears, William W. McEwen Jr., Charles M. Taylor Jr., and Stanley C. Lowry.

Dr. Pearl Chase presented an original oil painting of a Hope Ranch scene by Douglass Parshall to the chamber. It was one presented to her brother, the late Harold S. Chase, years ago by the chamber when he was named the only honorary member in the history of the organization.

Taylor, outgoing president, in thanking the officers, directors and committee members for their help during his term, said the chamber was instrumental in achieving agreement on the shape of the Crosstown Freeway, the vote in favor of a new city sewage plant, and approval by the County Board of Supervisors of the Allstate Insurance Co. building plans.

"We lost the insurance company, since it has apparently decided to cancel its building plans," Taylor added, "but we hope that the American Communities hotel-convention hall plans will go ahead on the Southern Pacific property facing East Beach."

Walt Disney, Inc., presented a preview of a new animated cartoon film, "Robin Hood," to be released next Christmas.

EXHIBIT H

# Business and Finance

C-8 C Santa Barbara, Calif., News-Press, Wednesday, December 10, 1975

## McEwen will head Chamber of Commerce

Willard W. McEwen Jr., lawyer and United States magistrate, was elected 1976 president of the Santa Barbara City and County Chamber of Commerce yesterday by the directors at the Montecito Country Club, succeeding Thomas Brashears, owner of The Office Mart.

It was announced that M. Scott Stewart, 35, with the Greater San Francisco Chamber of Commerce for seven years, has been appointed the executive vice president and manager here to succeed Stanley C. Lowry, when he retires on April 1.

**IN THE ELECTION** of officers, Silvio De Loreto, Sunset Co., realtors, was named president-elect. Al D. Paul, Santa Barbara Research Center, and John Kemp, public relations consultant, are 1976 vice presidents. Brashears becomes treasurer.

Newcomers to the board are Roger Clapp, Brinton's at Ott's; Timothy Garrett, Garrett's Furniture; Donald A. Hughes, Hughes Pontiac; and Mrs. E. K. Williams, Edwin K. Williams Co. president.

Retiring from the board were former president and treasurer Rodney J. Lamb, Cottage Hospital administrator; George Mroz, Cattlemen's Inn; and Robert Svoboda, Financial Group of America president. A fourth retiree, Donald L. Newton, resigned several months ago.

McEwen, 46, has practiced law here since 1961, when he became assistant district attorney. The following year he entered private practice. He has been active in chamber affairs since 1963.

WILLARD W. MCEWEN JR.
Succeeds Brashears

**STEWART WAS SELECTED** from among 35 candidates, including at least one woman, interviewed by a special committee headed by Rodney J. Lamb, past president. Many more applied originally.

A native of Louisiana and graduate of Mississippi College, Stewart was assistant general manager of the Greater Lake Charles, La., Chamber of Commerce, before going to San Francisco.

Stewart holds a master's degree in psychology from Millsaps University, Jackson, Miss. Although he has visited Santa Barbara, he plans to make his first official visit here in mid-January to attend the chamber's annual planning seminar.

EXHIBIT 1

Santa Barbara, Calif., News-Press, Tuesday, June 19, 1973 **B-3**

**McEWEN SWORN IN**

Chief Judge Albert Lee Stephens Jr., left, of the U.S. District Court in Los Angeles, congratulates William W. McEwen Jr. of Santa Barbara upon his swearing in to the part-time position of U.S. magistrate at Santa Barbara. McEwen will also continue his private law practice here.

**EXHIBIT J**

FILED

MAY 23 1974
CLERK, U.S. DISTRICT COURT.
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| MICHAEL R. WOOD, dba NATIONAL PHOTO SERVICES,<br>Plaintiffs,<br>v.<br>CHACE COMPANY ADVERTISING, INC., a corporation, et al.,<br>Defendants. | Civil No. 72-1179-RJK<br>MEMORANDUM OF DECISION AND ORDER DISMISSING ACTION |

This action was filed May 5, 1972, by Michael R. Wood, dba National Photo Services, seeking injunctive relief and money damages. Plaintiff alleged a violation of the copyright laws of the United States (Title 17 U.S.C.) by Chace Company Advertising, Inc., a corporation, and Thomas Chace, an individual (hereinafter collectively "Chace"), and as a second cause of action, alleged a violation of the anti-trust laws of the United States. Additionally, plaintiff sought, as pendent claims, relief under state law.

The charge of copyright infringement arose as a result of the alleged use by Chace of one of plaintiff's copyrighted photographs. The anti-trust action alleges a group boycott by defendants of plaintiff and plaintiff's services and is based primarily on a memorandum written by Thomas Chace in which he indicates that Chace will "reject any part of any

EXHIBIT K

job that has in any way been serviced by any individual in National Photo Services." (Complaint - Exhibit 3)

At the time this action was commenced, George Nicoletti, Esq., was attorney for plaintiff Wood. Defendants Chace were represented by Hillister, Brace and Angle, and defendant Better Business Bureau was represented by Monte L. Widders, Esq.

The record indicates that answers were duly filed on behalf of defendants Chace on July 14, 1972, and on behalf of defendant Better Business Bureau on November 27, 1972, following denial of a motion for a more definite statement.

On March 19, 1973, this Court, after hearing, denied the motion of Hollister, Brace and Angle to be relieved as attorneys of record for defendants Chace. On May 1, 1973, Hollister, Brace and Angle associated as attorneys of record Cavalletto, Webster, Mullen and McCaughey. Mr. Hugh Haferkamp, of that firm, has been active in representation of defendants Chace since that date.

On July 20, 1973, this Court approved the substitution of Michael R. Wood, attorney in propria persona, in place of attorney George Nicoletti.

It appears that discovery commenced prior to July of 1973, and that several depositions had been taken pursuant to an agreement between Messrs. Haferkamp, Nicoletti and Widders. Although there is some indication in the record of difficulties in discovery prior to the substitution of Michael R. Wood, in propria persona, as attorney of record, none was brought to the attention of the Court.

In August of 1973, plaintiff, in propria persona, filed several documents relating to discovery, including requests for production of documents from both parties and non-parties, and noticed the taking of thirty depositions of party and non-party witnesses. On September 17, 1973, this Court heard plaintiff's various motions for orders for production of documents. The Court denied plaintiff's Rule 37 motions as to two non-parties to the action and continued the hearing to September 24 on plaintiff's remaining motions. At the September 17 hearing, the Court explained to plaintiff that Rule 37 sanctions were not applicable to non-parties and seriously questioned plaintiff's competence to pursue this complex copyright infringement and anti-trust action in propria persona. The parties were strongly admonished to be more cooperative in resolving their differences regarding future discovery.

On September 24, this Court, after argument by counsel and recognizing that discovery in this action would require closer direction by the Court, ordered that the parties meet at Mr. Haferkamp's office on October 3, 1973, at 10:00 a.m. for the purpose of complying with Local Rule 3 to prepare and file by October 9, 1973, a written stipulation of issues remaining to be resolved by the Court, in compliance with Local Rule 3(1).

The Court also denied plaintiff's motion for sanctions as to defendant Better Business Bureau. Hearing on plaintiff's other motions regarding discovery was continued to October 29, 1973.

At the hearing on October 29, 1973, this Court ordered all motions regarding discovery denied, but did not impose sanctions on any party. It was the opinion of the Court at that time that many of the documents sought to be obtained by plaintiff were not relevant to the action, and that defendants were otherwise making a good-faith effort to comply with plaintiff's discovery requests.

In December of 1973, plaintiff filed 18 sets of

EXHIBIT K

interrogatories directed to the Chace defendants. Interrogatories 1 through 4 were answered prior to hearing on January 29, 1974, on the Chace defendants' motion for a protective order and on plaintiff's motion to strike answer and enter default judgment. All motions were denied at the hearing. On January 31, 1974, this Court, upon a review of the remaining interrogatories and request for production of documents, ordered, on its own motion, that all discovery be completed no later than February 20, 1974.

At the hearing on April 1, 1974, on plaintiff's motion for reconsideration, the January 31 order terminating discovery was vacated. The Court, however, recognizing that past difficulties in proceeding with discovery would probably continue, referred the matter to Willard W. McEwen, Jr., U.S. Magistrate, a special master in Santa Barbara, California, to supervise future discovery proceedings. The Court further ordered that the plaintiff, Michael R. Wood, present himself for his deposition to be taken by the defendants on April 15, 1974, at 10:00 a.m. at a place to be designated by the special master, and that defendant Thomas Chace present himself for his deposition to be taken by the plaintiff on April 22, 1974, at 10:00 a.m. The Court also ordered plaintiff's interrogatories, sets five through eighteen, which the Court considered to be in large part repetitive, oppressive, and of little relevance to this action, withdrawn without prejudice. Plaintiff Wood was then given opportunity to file additional interrogatories, with the requirement that such interrogatories be reasonably related to the subject matter of this case.

On April 15, 1974, the date on which plaintiff had been ordered by this Court to present himself for his deposition to be taken, he appeared in this Court and made an ex

EXHIBIT K

*parte* motion for permission to file an interlocutory appeal from this Court's earlier order of reference to a special master to supervise discovery. Plaintiff's motion was denied. On April 29, 1974, hearing was held on defendants' ex parte application for an order dismissing plaintiff's action and for sanctions for failure to comply with this Court's orders and the orders of the special master relative to discovery. As support for this motion, defendants included an affidavit and interim report of the special master. That report indicates, essentially, that plaintiff has been singularly uncooperative in following the directions of the special master regarding discovery. Specifically, plaintiff failed to appea on April 15, 1974, at 10:00 a.m., as directed by this Court, and did not appear until approximately 2:45 p.m. on that day. On the following day, Tuesday, April 16, 1974, plaintiff's deposition was noticed for 8:30 a.m., but plaintiff did not appear until 9:45 a.m. Although the special master ordered Wood to produce certain documents in his possession, these documents were never produced by Wood. Also, in regard to the Chace deposition which commenced as scheduled on April 22, 1974. the special master reports that Mr. Wood refused to accept his instructions regarding procedures to be followed in taking the Chace deposition and repeatedly followed lines of questioning after appropriate objections had been sustained by him. The report also indicates that Mr. Wood has been evasive in responding to interrogation, frequently asserting a lack of recollection and the fact that he had not "thought about" certain subjects which were obviously subjects upon which he could have expected interrogation. Specifically, the special master comments that "many of the answers denying knowledge and recollection stretched one's credulity to the utmost, and on several occasions I found it impossible to

EXHIBIT K

believe that Mr. Wood could not have recalled the particular point. In many respects, Mr. Wood's approach to the discovery proceedings has been cavalier and has certainly bordered upon being contemptuous, if not actually so." (Interim Report of Special Master, filed April 29, 1974.)

At the hearing on April 29, 1974, this Court denied both plaintiff's and defendants' ex parte applications for orders regarding discovery, but ordered that the case be set for hearing on order to show cause why the action should not be dismissed for failure of the plaintiff to comply with the orders of this Court. Such hearing was set for May 6, 1974, and both sides were given opportunity to file by May 2, 1974, memorandums of law and other material relative to that order to show cause.

At hearing on May 6, 1974, this Court heard argument by Mr. Wood regarding this order to show cause why the action should not be dismissed, and also representation from Mr. Wood of his attempts in the past and presently to secure counsel. The Court pointed out to Mr. Wood that on almost every prior proceeding, the Court had strongly advised Mr. Wood against proceeding in his own behalf in a case of this complexity, and that the Court had many times suggested that Mr. Wood acquire counsel prior to proceeding. All such advice by the Court has heretofore been rejected by plaintiff Wood, who persisted in his desire to continue in propria persona despite the frequent and significant difficulties encountered thereby.

This Court has on many occasions indulged various shortcomings on behalf of Wood, in the belief that, despite the difficulties presented, the plaintiff should be allowed to proceed in propria persona, should he desire to follow that course. Now, however, after nine months of proceeding

EXHIBIT K

in this manner, and nine separate hearings on matters solely related to difficulties arising in the discovery process of this case, the Court has come to the conclusion that willfulness is involved in plaintiff's failure to proceed in a lawyer-like manner for the purposes of conducting discovery. This conclusion is based on the nature and manner of plaintiff's own discovery efforts as evidenced by his extensive and often irrelevant interrogatories as noted above. In addition, the Court considers the applicable and appropriate portions of the interim report of the special master who was appointed by this Court to directly supervise and conduct future discovery in this case. Finally, the Court is cognizant of plaintiff's nine appearances before this Court regarding discovery matters.

Based on all of the above, the Court finds that plaintiff is willfully flouting the power of this Court to direct and control the discovery process of cases before it. To allow plaintiff to continue at this time to prosecute this action in the manner in which it has heretofore been prosecuted would constitute this Court's tolerance and acquiescence in an abuse of the processes of the United States District Courts. This Court cannot, and will not, tolerate that abuse. Accordingly,

IT IS ORDERED that this action should be and hereby is dismissed with prejudice under Federal Rule of Civil Procedure 37(b) for the failure of the plaintiff to comply with the Federal Rules of Civil Procedure, the Local Rules of the United States District Court for the Central District of California, the specific orders of this Court regarding discovery, and the orders of the special master appointed to supervise discovery in this case.

/// ///

EXHIBIT K

The Clerk of the Court shall send, by United States mail, copies of this Order to all counsel herein.

DATED: May 23, 1974.

ROBERT J. KELLEHER
United States District Judge

EXHIBIT K

FILED 6

MAY 23 1974
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED

JUN 10 1974

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| MICHAEL R. WOOD, dba NATIONAL PHOTO SERVICES,<br>Plaintiffs,<br>v.<br>CHACE COMPANY ADVERTISING, INC., a corporation, et al.,<br>Defendants. | Civil No. 72-1179-RJK<br>JUDGMENT |

This action came on for hearing on May 6, 1974, on this Court's order to show cause why the action should not be dismissed under Federal Rule of Civil Procedure 37. A decision having been duly rendered, and the Court having set forth its reasons for dismissal in its Memorandum of Decision,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing and that the action be dismissed.

DATED: May 23, 1974.

ROBERT J. KELLEHER
United States District Judge

✓ Docketed
✓ Mld copy Ptys ✓
✓ Mld Notice Ptys
✓ JS-6

742

EXHIBIT L

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, dba NATIONAL PHOTO SERVICES,

Plaintiff,

vs.

CHACE COMPANY ADVERTISING, INC., a corporation; THOMAS CHACE, an individual; and BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., a corporation,

Defendants.

No. 72-1179-RJK

Deposition of STANLEY LOWRY, taken on behalf of Plaintiff, at 1934 North Jamison, Santa Barbara, California, commencing at 9:00 A.M., Thursday, February 14, 1974, before Peggie S. Falconer, CSR, Notary Public, pursuant to Subpoena.

**EXHIBIT M**

four ads prepared, to the best of my knowledge.

Q Tom Chace did know that this was a separate program and these ads were not for the All Year Association's use?

A These ads, yes. These were special ads that were prepared for this program, and they were not to be used for our regular program.

MR. WOOD: Off the record for a second.

(A discussion was held off the record.)

MR. WOOD: Q At any time did Chace Company Advertising or Thomas Chace inform you who the pictures were photographed by in those four ads for the Santa Barbara Tourist Emergency Program?

A No.

Q Was Chace Company Advertising acting as an agent for the All Year Association in regards to this program? ✓

A Well, I don't know what you mean by the word "agent."

Q Acting on behalf.

A They were our advertising agent of record.

Q Were they acting on behalf of the All Year Association to place those four ads?

A Yes.

Q Was the All Year Association acting on behalf of the four oil companies to have those four ads placed?

A Yes. Our agreement with them was that they

EXHIBIT M

Montecito Bed Tax Committee?

A I don't know.

Q Is the Santa Barbara All Year Association a corporation?

A Yes.

Q Where is it incorporated?

A State of California.

Q Is it filed with the Santa Barbara County Courthouse?

A I believe it is.

Q When was it incorporated?

A I think it was -- those records are at the office. I think it was in the late 1940's or the early 1950's.

Q Was the Santa Barbara All Year Association started in the late 1940's or the early 1950's?

A Yes.

Q Are you referring to the All Year Association and also the Chamber of Commerce?

A No. The All Year Association is a subsidiary corporation of the Chamber of Commerce. ✓

Q Is the Montecito Bed Tax a corporation?

A No.

Q It is not?

A No.

Q What is it if it is not incorporated?

EXHIBIT M

COPY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

--o0o--

MICHAEL R. WOOD, etc.,

Plaintiff,

vs.

No. 72-1179-RJK

CHACE COMPANY ADVERTISING, INC.,
etc., et al.,

Defendants.

Use complete caption

-----

DEPOSITION of THOMAS C. CHACE, taken on behalf of plaintiff, at 1934 North Jamison, Santa Barbara, California commencing at Tuesday, February 12, 1974, before Peggie S. Falconer, C.S.R., Notary Public, pursuant to Subpoena.

Santa Barbara, California, Tuesday, June 26, 1973

Peggie S. Falconer
Certified Shorthand Reporter
1117 Bloomdale Street
Duarte, California
(213) 359-3932

-----

~~JOHN R. HOSSACK & ASSOCIATES~~
~~CERTIFIED SHORTHAND REPORTERS~~
~~1114 STATE STREET~~
~~SANTA BARBARA, CALIF. 93104~~
~~AREA CODE (805) 966-4562~~

~~Reported By T. L. Baer, CSR~~

~~Our File No. 3567~~

EXHIBIT N

A. No, they would not be included.

Q. Westen's Camera Shop?

A. They would not have been included.

Q. Jerome Weidmann?

A. I don't know a Jerome Weidmann.

Q. Amateur photographer. You don't know a Jerome Weidmann?

A. I don't know him.

Q. Sheffield Electronics?

A. I don't know a Sheffield Electronics.

Q. Acclaim Photo?

A. If memory serves me correctly, that is an out-of-town photographer that we would not have included in the group of what I call vendors, because, if we use the out-of-town photographer, it was for an assignment out of town, and would not have been a regular source of photographs.

Q. All-Year Association of Santa Barbara?

A. The All-Year Association is a client, and that client would have been one that I would have considered appropriate to receive the memo.

Q. Did they receive one?

A. I don't know that.

Q. All right. Santa Barbara Chamber of Commerce?

A. The two are synonymous; All-Year Association is a subsidiary of the Chamber of Commerce. The same answer applies. They would be appropriate to receive a memo.

Q. Santa Barbara News-Press?

A. Santa Barbara News-Press, our local daily newspaper,

EXHIBIT N

(VERIFICATION—446 and 2015.5 C.C.P.)

STATE OF CALIFORNIA,
County of Santa Barbara } ss. ~~I, the undersigned, say: I am the~~

I, MICHAEL R. WOOD, being first duly sworn, depose and say that I am the plaintiff

in the above entitled action; I have read the foregoing FIRST AMENDED COMPLAINT IN ACTION TO VACATE JUDGMENT PROCURED BY FRAUD UPON THE COURT FOR FRAUD, F.R.Civ.P. Rule 60 (b)(3), (6), JURY TRIAL DEMAND and know the contents thereof; and that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters that I believe it to be true.

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.

Executed on August 29, 1977 (date) at Santa Barbara, California (place), California

Subscribed and sworn to before me this 29th day of August 1977.

Anita A. Cromwell
Notary Public for said State

OFFICIAL SEAL
ANITA A. CROMWELL
NOTARY PUBLIC - CALIFORNIA
SANTA BARBARA COUNTY
My comm. expires APR 1, 1981

Michael R. Wood
(Signature)
Michael R. Wood

(PROOF OF SERVICE BY MAIL—1013a, and 2015.5 C.C.P.)

STATE OF CALIFORNIA,
County of ______ } ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a employed in / resident of the County of ______, over the age of eighteen years and not a party to the within action or proceeding; that my residence / business address is ______ ; that on ______, 19___, I served the within ______ on the ______ in said action or proceeding by depositing a true copy thereof inclosed in a sealed envelope with postage thereon fully prepaid, in a mail-box, sub-post office, substation, or mail chute (or other like facility), regularly maintained by the Government of the United States at ______ in the City of ______, California, addressed to the attorney___ of record for said ______ at the office / residence address of said attorney___, as follows:

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.

Executed on ______ (date) at ______ (place), California

______
(Signature)

WOLCOTTS 611P. Rev. 8-71

## APPENDIX F (1)

FILED
AUGUST 30, 1977
CLERK U.S. DISTRICT COURT
Central District of California

MICHAEL R. WOOD
1266 Coast Village Road
Santa Barbara, California 93108
[805] 969-0465

Attorney for Plaintiff
In Pro Per

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, individually and dba
NATIONAL PHOTO SERVICE,

Plaintiff,

-vs-

WILLARD W. MCEWEN, JR., et al,

Defendants.

No. 77-1762-FW

## REQUEST FOR ADMISSION OF FACTS

[F.R. CIV. P. 36 (a)]

TO: DEFENDANTS, WILLARD W. McEWEN, JR.; HUGH J. HAFERKAMP; MONTE L. WIDDERS; CHACE COMPANY ADVERTISING, INC., a corporation; THOMAS CHACE, an individual; BETTER

BUSINESS BUREAU OF SANTA BARBARA, INC. aka BETTER BUSINESS BUREAU OF THE TRI-COUNTIES INC., a corporation, SANTA BARBARA CHAMBER OF COMMERCE, INC., a corporation; ALL YEAR ASSOCIATION, a subsidiary corporation of the Santa Barbara Chamber of Commerce; AETNA LIFE & CASUALTY, INC., a corporation; HARTFORD LIFE INSURANCE COMPANY, a corporation, aka HARTFORD INSURANCE GROUP; CAVALLETO, WEBSTER, MULLEN & McCAUGHEY, a partnership; HOLLISTER, BRACE & ANGLE, a partnership; HOLLISTER & BRACE, INC. a corporation formerly Hollister, Brace & Angle, a partnership; GEORGE A. REMPE, III; J. JAMES HOLLISTER, III; JAMES W. BROWN.

TO DEFENDANTS' ATTORNEYS:

Plaintiff, Michael R . Wood, requests the defendants and each of them named hereinabove, to make the following admissions under oath and within 45 days from the service of this request, all in accordance with Rule 36 of the Federal Rules of Civil Procedure [28 USCA] for the purpose of this action only and subject to all objections as to admissibility which may be interposed at the trial, the truth of the following facts:

1. That on March 27, 1974, all of

the defendants in the original action, specifically requested the court to appoint Willard W. McEwen, Jr., a United States Magistrate, as a Special Master to "supervise the discovery."

2. On April 1, 1974, the court adopted the defendants' specific request and did appoint said Willard McEwen, all against objections by the plaintiff.

3. On April 28, 1974, defendant Monte Widders hand delivered to the plaintiff two documents (1) Notice of ex parte application for an order dismissing plaintiff's action based in part on the purported orders of said McEwen, as a Special Master and (2) a copy of a conclusory affidavit and interim report of Special Master Willard McEwen purportedly prepared by said McEwen.

4. Defendants ex parte application was based upon the purported affidavit allegedly prepared by Special Master

Willard McEwen on behalf of all defendants.

5. Willard W. McEwen, from 1965 to 1976, was actively involved in the Santa Barbara Chamber of Commerce.

6. That Willard McEwen was President of Santa Barbara Chamber of Commerce for the year 1976 and assisted in advertising programs designed to finance tourist promotions administered by the All Year Association, a Chamber of Commerce non-profit subsidiary.

7. That McEwen was an officer of the Santa Barbara Chamber of Commerce for the years 1972, 1973, 1974, 1975, and 1976.

8. Chace Company Advertising, Inc. and Thomas Chace acted as agents for the Santa Barbara Chamber of Commerce in placing advertising in the media.

9. Chace Company Advertising, Inc. was the advertising agent for the All Year Association, a subsidiary of the Santa

Barbara Chamber of Commerce.

10. No defendant named herein in this case has disposed of, removed, or destroyed any evidence relevant to this cause of action and also as to case No. 72-1179-RJK to date.

11. That at no time did William W. McEwen either disclose his dual status and the inherent conflict of interest on his part to the Honorable Robert J. Kelleher, Judge of the United States District Court, Central District of California.

12. That said Rolodex of Linda Randolph, who was an employee of Chace Company Advertising, Inc., has not been destroyed and exist.

13. That on April 1, 1974, when Hugh Haferkamp questioned the Honorable Robert J. Kelleher if the depositions were to be taken under the supervision of the Special Master Willard McEwen or in his direct presence, it was stated that day that they

were in fact to be taken "directly in his presence" by the Honorable Robert J. Kelleher.

Dated: August 29, 1977

(signed) Michael R. Wood

MICHAEL R. WOOD
Attorney for Plaintiff

## APPENDIX F (2)

FILED
NOVEMBER 14, 1977
CLERK U.S. DISTRICT COURT
Central District of California

KOSMO & WALSH
520 West Fifth Street
Post Office Box 5405
Oxnard, California 93031
Telephone (805) 487-0411

Attorneys for Defendant
SANTA BARBARA CHAMBER OF COMMERCE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, individually and dba NATIONAL PHOTO SERVICES,

Plaintiff,

-vs-

WILLARD W. McEWEN, JR.. HUGH J. HAFERKAMP; MONTE L. WIDDERS: CHACE COMPANY, ADVERTISING, INC., a corporation; THOMAS CHACE, and [sic] individual; BETTER BUSINESS BUREAU OF SANTA BARBARA, INC., aka BETTER BUSINESS BUREAU OF THE TRI-COUNTIES INC., a corporation; SANTA BARBARA CHAMBER OF COMMERCE, INC., a corporation: ALL YEAR ASSOCIATION,, a subsidiary corporation of Santa Barbara Chamber of Commerce; AETNA LIFE & CASUALTY, INC., a corporation; HARTFORD LIFE INSURANCE COMPANY, a corporation ; aka HARTFORD INSURANCE

GROUP; CAVALLETTO, WEBSTER, MULLEN &
McCAUGHEY, a partnership; HOLLISTER,
BRACE, & ANGLE, a partnership; HOLLISTER,
BRACE, INC., a corporation formerly
Hollister, Brace & Angle, a partnership;
GEORGE A. REMPE, III; J. JAMES HOLLISTER,
III; JAMES A BROWN,

Defendants.

NO. 77-1762-FW

STIPULATION
RE: DISCOVERY
DATE: Nov. 14, 1977
TIME: 10:00 a.m.
PLACE: Courtroom 7

## STIPULATION

It is hereby stipulated by and between plaintiff, Michael R. Wood and defendant Santa Barbara Chamber of Commerce, by KOSMO & WALSH its attorney:

(1) Plaintiff's request to produce documents, served August 30, 1977, as to items No. 1 and No. 2, will be produced on November 15, 1977, and plaintiff will be allowed to copy said documents, if necessary.

(2) Plaintiff's request for

admissions, served on August 30, 1977, all be deemed admitted as to this party defendant.

(3) Plaintiff's request for admissions to genuineness of documents be deemed established as to this party defendant.

(4) Plaintiff agrees to take off calender motion relating to the above matters which was filed on October 25, 1977.

DATED: November 11, 1977.

(signed) Michael R. Wood

MICHAEL R. WOOD, Plaintiff

(signed) Henry J. Walsh

SANTA BARBARA CHAMBER OF
COMMERCE; KOSMO & WALSH,
Attys.,
By: Henry J. Walsh

(signed) Francis C. Whelan

United States District
Judge FRANCIS C. WHELAN

# Supplemental
# Petitioner's
# Reply Brief

Office - Supreme Court, U.S.
FILED
FEB 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1070

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MICHAEL R. WOOD, individually and dba

NATIONAL PHOTO SERVICES,

Petitioner,

-vs-

WILLARD W. McEWEN, JR., et al.,

Respondents.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

# PETITIONER'S SUPPLEMENTAL REPLY MEMORANDUM

---

MICHAEL R. WOOD
1266 Coast Village Road
Santa Barbara, CA 93108
(805) 969-5935

Petitioner Pro Se

February 14, 1982

No. 81-1070

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MICHAEL R. WOOD, individually and dba

NATIONAL PHOTO SERVICES,

Petitioner,

-vs-

WILLARD W. McEWEN, JR., et al.,

Respondents.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

# PETITIONER'S SUPPLEMENTAL REPLY MEMORANDUM

---

MICHAEL R. WOOD
1266 Coast Village Road
Santa Barbara, CA 93108
(805) 969-5935

Petitioner Pro Se

February 14, 1982

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No. 81-1070

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MICHAEL R. WOOD, individually and dba
NATIONAL PHOTO SERVICES,

Petitioner,

vs.

WILLARD W. McEWEN, JR., et al.,

Respondents.

---

# PETITIONER'S SUPPLEMENTAL
# REPLY MEMORANDUM

Attached to petitioner's reply memorandum as Appendix .F is petitioner's Request For Admission Of Facts and the court-approved stipulation by which the Santa

Barbara Chamber of Commerce admitted all of the stated facts. Many of those facts are also supported by the exhibits attached to the first amended complaint (Appendix E).

The Haferkamp/Brace response to the petition herein attempts (at pages 6-7) to repudiate the stipulation and asserts (page 4) that petitioner's characterization of the All Year Association as a subsidiary of the Chamber of Commerce is "obviously inaccurate." Attached hereto as Appendix G is the Response To Request For Admission Of Facts filed by Mr. Haferkamp on behalf of the Chace defendants and himself, and verified by himself on personal knowledge. Among the facts admitted without qualification are those in paragraph 9 of the request:

"Chace Company Advertising, Inc.

> was the advertising agent for the All Year Association, a subsidiary of the Santa Barbara Chamber of Commerce."

Further, Mr. Haferkamp and his clients admitted that Mr. McEwen was actively involved in Chamber of Commerce activities from 1967 to 1976 (par. 5); that he was an officer of the Chamber from 1973 to 1976 (par. 7); and that Mr. McEwen's membership in the Chamber of Commerce was not mentioned to Judge Kelleher (par. 11).

Attached hereto as Appendix H are the Answers To Request For Admission Of Facts filed by Mr. Widders and his clients, the other parties who have responded to the petition herein. Among the facts they admitted were that Mr. McEwen was actively involved in the Santa

Barbara Chamber of Commerce from 1965 to 1976 (par. 5); that he was an officer from 1972 to 1976 (par. 7); that the All Year Association "is a subsidiary of the Santa Barbara Chamber of Commerce" (par. 9); that the Chace defendants placed advertising for the Santa Barbara Chamber of Commerce (par. 8); and that Mr. McEwen did not inform Judge Kelleher that he was an officer or director of the Chamber (par. 11).

February 14, 1982

Respectfully submitted,

MICHAEL R. WOOD
1266 Coast Village Road
Santa Barbara, CA 93108
(805) 969-5935

Petitioner Pro Se

# APPENDICES

# APPENDIX

G Response To Request for Admission of Facts - Defendants Chace Company Advertising, Inc., a corporation, Thaomas Chace, and Hugh J. Haferkamp.....

H Answers To Plaintiff's Request For Admission Of Facts - Defendants Better Business Bureau Tri-Counties, Inc. and Hartford Indemnity Company...............

## APPENDIX G

FILED
OCTOBER 26, 1977
CLERK U.S. DISTRICT COURT
Central District of California

HUGH J. HAFERKAMP
Attorney and Counselor at Law
1335 State Street
Santa Barbara, CA 93101
(805) 963-0838

Attorney for Defendants
Chace Company Advertising, Inc.,
a corporation, Thomas Chace, and
Hugh J. Haferkamp In propria persona

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, etc.,

Plaintiff,

v.

WILLARD W. McEWEN, JR., et al.,

Defendants.

No. 77-1762-FW

### RESPONSE TO REQUEST FOR ADMISSION OF FACTS

Defendants Chace Company Advertising, Inc., a corporation, Thomas Chace, and Hugh J. Haferkamp make the following responses to plaintiff's request for admission of facts:

1. We admit that on the date alleged defendants Chace Company Advertising, Inc. and Thomas Chace requested that the District Court appoint a special master to supervise the discovery proceedings. However, those defendants did not "specifically request" the appointment of Mr. McEwen. Mr. McEwen was merely suggested. The Better Business Bureau joined in the request of the defendants mentioned.

2. We do not admit this as framed. As indicated above, Mr. McEwen was not specifically requested. However, we do admit

that, on the date stated, the Court did appoint Mr. McEwen and the plaintiff did object to Mr. McEwen's appointment.

3. These defendants do admit the substance of the statement. However, we deny that the affidavit and interim report was "conclusory" because we contend it was a factual affidavit and we do not admit that the document purported to have been prepared by Mr. McEwen.

4. We are unable to admit this request as framed because the application was based only in part upon Mr. McEwen's affidavit. The application was based upon the files and records in the Court, the memorandum of points and authorities, and the affidavit of Hugh Haferkamp. Furthermore, we deny that Mr. McEwen purported to have prepared the

affidavit "on behalf of all defendants."

5. We admit that Mr. McEwen was involved in the Chamber of Commerce activities during the period of time stipulated and that he probably would be considered "actively" involved in Chamber activities.

6. We admit that Mr. McEwen was president for the year 1976, but we deny that he assisted advertising programs administered by the All-Year Association during that year.

7. We admit the facts stipulated except with respect to the year 1972. Our information indicates that Mr. McEwen was not an officer during 1972.

8. This is denied in its totality. In the first place, Mr. Chace acted solely as an employee of Chace Company Advertising, Inc.

Secondly, there is no time frame specified. Furthermore, Chace Company Advertising, Inc. did not act for the Chamber of Commerce in placing advertising. Also, we deny that Chace Company Advertising, Inc. was legally an "agent" and we take the position that it was an independent contractor.

9. Admitted.

10. We cannot admit this statement. No date is set forth as a beginning point. If August 1, 1969 is selected as a beginning point, Chace Company Advertising, Inc. probably has destroyed items in the ordinary course of its business that might have been relevant to this cause of action and to the case identified. Additionally, we cannot determine what was meant by the term "evidence" as used in this question.

11. We do not admit this as framed because we do not admit that Mr. McEwen had either a "dual status" or a "conflict of interest," "inherent" or otherwise. However, if the request is intended to deal with his membership in the Chamber of Commerce, we do not believe that that was mentioned to Judge Kelleher. It is our understanding and contention that Mr. McEwen had no association with the All-Year Association during the relevant period.

12. We do not admit this request. First of all, the Rolodex in question was constantly in a state of flux as names were added and removed. Consequently, a date would be necessary to serve as an identifying time. Furthermore, we do not know the present location of the said Rolodex, so it may have been

destroyed.

13. This is admitted. However, the written order signed and filed subsequent to April 1, 1974 specifically authorized Mr. McEwen to order that the depositions proceed without his presence.

Dated: October 13, 1977

(signed) Hugh J. Haferkamp
HUGH J. HAFERKAMP
Attorney for Defendants Chace Company Advertising, Inc., a corporation, Thomas Chace, and In propria persona

STATE OF CALIFORNIA )
COUNTY OF SANTA BARBARA) ss.

HUGH J. HAFERKAMP, being sworn, says:

That I am one of the defendants in the above entitled action; that I have read the foregoing RESPONSE TO REQUEST FOR ADMISSION OF FACTS and know the contents thereof, and I certify that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

(signed) Hugh J. Haferkamp

Subscribed and sworn to before
me this 13th day of October, 1977.

(signed) John H. Riffero
Notary Public in and for said State.

(Seal)

## APPENDIX H

FILED
OCTOBER 26, 1977
CLERK U.S. DISTRICT COURT
Central District of California

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OF TRI-COUNTIES, INC. and HARTFORD
ACCIDENT & INDEMNITY CO.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL R. WOOD, etc.,

Plaintiff,

vs.

WILLARD W. McEWEN, JR., et al.,

Defendants.

Case No. 77-1762-FW

Defendants, BETTER BUSINESS BUREAU OF THE TRI-COUNTIES, INC. and

HARTFORD ACCIDENT & INDEMNITY COMPANY hereby submit their answers to Plaintiff's Request for Admission of Facts, as follows:

REQUEST NO: 1:

That on March 27, 1974, all of the defendants in the original action, specifically requested the court to appoint Willard W. McEwen, Jr., a United States Magistrate, as a Special Master to "supervise the discovery".

ANSWER NO. 1

Admit that on March 27, 1974 Defendant, THOMAS CHACE and CHACE COMPANY ADVERTISING, INC. specifically requested the Court to appoint a Special Master to supervise discovery which said request was joined in by Defendant, BETTER BUSINESS BUREAU. Deny that said request "specifically" requested the court to appoint WILLARD W. McEWEN, JR., a United States Magistrate as the Special Master. The request made by the Defendants suggested that Mr. McEwen be appointed.

REQUEST NO. 2:

On April 1, 1974, the court adopted the defendants' specific request and did appoint said WILLARD McEWEN, all against objections by the plaintiff.

ANSWER No. 2

Admit that on April 1, 1974 that the Court adopted the Defendants' request to appoint a Special Master to supervise the discovery. Deny that the court adopted the Defendants' specific request to appoint WILLARD W. McEWEN as Special Master as the Defendants had merely suggested Mr. McEWEN. Admit that WILLARD W. McEWEN, JR. was appointed

Special Master on April 1, 1974. Admit that the Plaintiff objected to the appointment of Mr. McEWEN as Special Master.

REQUEST NO. 3

On April 28, 1974, defendant Monte Widders had delivered to the plaintiff two documents (1) Notice of ex parte application for an order dismissing plaintiff's action based in part on the purported orders of said McEWEN, as a Special Master and (2) a copy of a conclusory affidavit and interim report of Special Master Willard McEWEN purportedly prepared by said McEWEN.

ANSWER NO. 3.

Admit that on April 28, 1974, Defendant MONTE WIDDERS hand delivered to Plaintiff two documents (1) Notice of Ex Parte Application for Order Dismissing plaintiff

Action, and (2) Affidavit and Interim Report of Special Master, WILLARD W. McEWEN. Deny that the ex parte application was based upon purported orders of the Special Master. The application was instead based upon the actual orders of the Special Master. Deny that the affidavit and interim report of the Special Master, WILLARD W. McEWEN was either conclusionary or that its submittal by the Special Master in any was purports to indicate that it was prepared by the Special Master.

REQUEST NO. 4

Defendants' ex parte application was based upon the purported affidavit allegedly prepared by Special Master Willard McEwen on behalf of all defendants.

ANSWER NO. 4:

Deny that the Defendants' ex

parte application for order dismissing Plaintiff's action was based upon the affidavit and interim report of Special Master, WILLARD W. McEWEN. The Defendants' ex parte application was instead based on not only the affidavit of the special Master, but the affidavit of HUGH J. HAFERKAMP, the files and records contained in action No. 72-1179 RJK and the Memorandum of Points and Authorities filed therewith.

REQUEST NO. 5:

WILLARD W. McEWEN, from 1965 to 1976, was actively involved in the Santa Barbara Chamber of Commerce.

ANSWER NO. 5:

Admit

REQUEST NO. 6:

That WILLARD McEWEN was President of Santa Barbara Chamber of Commerce for the year 1976 and assisted in advertising programs designed to finance tourist promotions administered by the All Year Association, a Chamber of Commerce non-profit subsidiary.

ANSWER NO. 6:

Admit that WILLARD McEWEN was President of the Santa Barbara Chamber of Commerce during the year 1976. Defendants cannot with reasonable dilligence determine precisely what Mr. McEWEN'S activities were relating to advertising and therefore cannot truthfully admit or deny the remainder of the request.

REQUEST NO. 7:

That McEWEN was an officer of the Santa Barbara Chamber of Commerce for the years 1972, 1973, 1974, 1975, and 1976.

ANSWER NO. 7:

Admit.

REQUEST NO. 8:

CHACE COMPANY ADVERTISING, INC. and THOMAS CHACE acted as agents for the Santa Barbara Chamber of Commerce in placing advertising in the media.

ANSWER NO. 8:

Deny. CHACE COMPANY ADVERTISING, INC. and THOMAS CHACE acted as an independent contractor with respect to the placing of advertisement on behalf of the Santa Barbara Chamber of Commerce.

REQUEST NO. 9:

CHACE COMPANY ADVERTISING, INC. was the advertising agent for the All Year Association, a subsidiary of the Santa Barbara Chamber of Commerce.

ANSWER NO. 9:

Admit that the ALL YEAR ASSOCIATION is a subsidiary of the

Santa Barbara Chamber of Commerce. Deny that CHACE COMPANY ADVERTISING, INC. was the advertising agent for the ALL YEAR ASSOCIATION. CHACE COMPANY ADVERTSING, INC. was at all times acting as an independent contractor with respect to the placing of advertisement on behalf of the ALL YEAR ASSOCIATION or the Santa Barbara Chamber of Commerce.

REQUEST NO. 10:

No defendant named herein in this case has disposed of, removed, or destroyed any evidence relevant to this cause of action and also as to case No. 72-1179 RJK to date.

ANSWER NO. 10:

Admit that Defendants, BETTER BUSINESS BUREAU OF THE TRI-COUNTIES, INC. and HARTFORD ACCIDENT & INDEMNITY COMPANY have not disposed of, removed or destroyed any evidence relevant to this cause of action and also as to case No. 72-1179-RJK.

REQUEST NO. 11:

That at no time did WILLARD W. McEWEN either disclose his dual status and the inherent conflict of interest on his part to the Honorable Robert J. Kelleher, Judge of the United States District Court, Central District of California.

ANSWER NO. 11

Admit that WILLARD W. McEWEN, JR. did not inform the Honorable Robert J. Kelleher, Judge of the United States Disrict Court, Central District of California that he was an officer or director of the Santa Barbara Chamber of Commerce. Deny that McEWEN's failure to so inform Judge Kelleher constitutes an inherent conflict of interest.

REQUEST NO. 12:

That said Rolodex of Linda Randolph, who was an employee of CHACE COMPANY ADVERTISING, INC., has not been destroyed.

ANSWER NO. 12:

Defendants cannot with reasonable diligence determine what a rolodex is or whether one relating to Linda Randolph has or has not been destroyed. For this reason Defendants cannot truthfully admit or deny this allegation.

REQUEST NO. 13:

That on April 1, 1974, when HUGH HAFERKAMP questioned the Honorable Robert J. Kelleher if the depositions were to be taken under the supervision of the Special Master WILLARD McEWEN or in his direct presence, it was stated that day that they were in fact to be taken "directly in his presence" by the Honorable Robert J. Kelleher.

ANSWER NO. 13:

Admit that on April 1, 1974, the Honorable ROBERT J. KELLEHER orally stated that depositions taken in case No. 72-1179-RJK were to be taken directly in the presence of the Special Master, WILLARD W. McEWEN, JR. However, the written order ruling on discovery motions, vacating prior order terminating discovery, and appointing Special Master signed by the Honorable ROBERT J. KELLEHER at page 2 thereof, beginning at line 31, reads as follows:

> "5. All depositions to be taken in this matter henceforth shall, unless otherwise ordered by the Special Master for good cause, be taken in the presence of the Special Master, and, except as otherwise provided in this

order, shall be taken at a time and place to be designated by the Special Master." (emphasis added)

Dated: October 25, 1977.

MYERS & WIDDERS

BY (signed) Monte L. Widders
MONTE L. WIDDERS
Attorneys for BETTER BUSINESS BUREAU OF THE TRI-COUNTIES, INC. and HARTFORD ACCIDENT & INDEMNITY COMPANY